

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

THE PHARMACEUTICAL-RESEARCH BOARDING  
COMPANY, INC.,

Appellants,

vs.

ALLEN L. KENNEDY, Regional  
Director of Radio 21 of the  
National Labor Relations Board,  
for and on behalf of the  
NATIONAL LABOR RELATIONS BOARD,  
et al.,

Appellees.

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An Appeal from the United States District Court, for  
the Northern District of California, Southern Division

BRIEF OF CHARGING PARTIES - APPELLANTS

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# TOPICAL INDEX

	Page
1 Preliminary Statement .....	1
2 Statement of the Case .....	2
3 Questions Presented .....	6
4 Summary of Argument .....	7
5 Argument .....	11

## I.

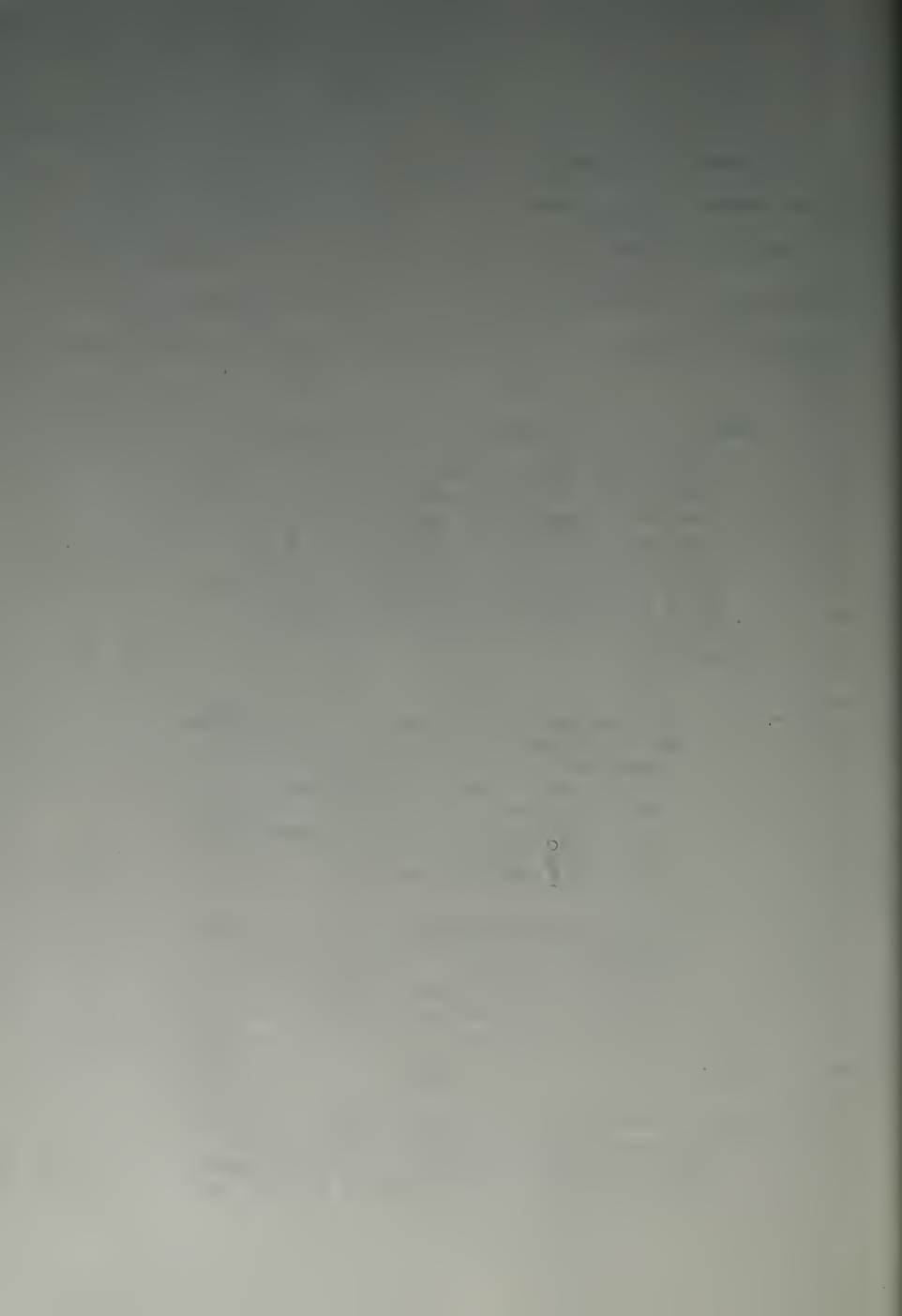
Under the "reasonable cause" standard of Section 10(1), a preliminary injunction should be granted if the District Court finds that the propositions of law and factual allegations underlying the Regional Director's petition are not insubstantial and frivolous, and on appeal, the scope of review is limited to a determination of whether the District Court's findings are clearly erroneous ..... 11

A. The Court's role in a Section 10(1) proceeding is confined to determining whether the Regional Director has reasonable cause to believe that an unfair labor practice has been committed, and all that this requires is the prima facie establishment of facts from which an inference might be drawn that the charge is true . . . . 13

B. Upon appeal from an order granting a preliminary injunction pursuant to Section 10(1), the District Court's finding of "reasonable cause" will not be set aside unless the same is clearly erroneous . . . . . 20

## II.

The District Court's finding that there was reasonable cause to believe that Appellants have engaged in unfair labor practices within the meaning of Section



8(b)(4)(1)(11)(B) of the Act is supported by substantial evidence and is not clearly erroneous . . . . . 27

A. The Regional Director's contention that autonomous divisions of a single corporation can be considered separate employers within the meaning of Section 8(b)(4)(B) is premised on an interpretation of the Act which is not clearly unreasonable or frivolous . . . . . 27

B. The District Court's finding that there is reasonable cause to believe that the Los Angeles Herald-Examiner is operated autonomously and independently of the San Francisco Examiner, the San Francisco Chronicle and the San Francisco Printing Company was not clearly erroneous . . . . . 50

### III.

The District Court's order denying Appellants' request for an order permitting depositions and/or interrogatories and/or compelling the attendance of witnesses was not clearly erroneous . . . . . 58

### IV.

The District Court's order that all evidence be presented by affidavits and that no oral testimony be heard unless otherwise ordered by the Court was not an abuse of discretion . . . . . 68

Conclusion . . . . . 77

# THE HISTORY OF THE CITY OF BOSTON

FROM THE FIRST SETTLEMENT  
TO THE PRESENT TIME  
BY  
JOHN H. COLEMAN  
OF THE  
CITY OF BOSTON

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## TABLE OF AUTHORITIES CITED

	<u>Cases</u>	<u>Page</u>
3	Acme Concrete & Supply Corp., 137 NLRB 1321 (1962).....	35
4	Alexander Warehouse & Sales Co., 128 NLRB 916 (1960).....	20
6	American Fed. of Radio & Television Artists v. Getreu, 358 F.2d 698 (6th Cir. 1958).....	22
7	Amalgamated Lithographers of America, 130 NLRB 985 (1961) .....	38
9	Angle v. Sacks, 382 F.2d 655 (10th Cir. 1967).....	23
10	Bachman Machine Co., 121 NLRB 1229 (1958) .....	33
11	Bachman Machine Co. v. NLRB, 266 F.2d 599 (8th Cir. 1959) .....	34
12	Drivers, Chauffeurs & Helpers Local No. 639 (Poole's Warehousing, Inc.), 158 NLRB 1281 (1966) .....	40,52
14	Fusco v. Richard W. Kaase Baking Co., 205 F.Supp. 459 (N.D.Ohio 1962) .....	15,62,66
16	General Electric Co. v. American Wholesale Co., 235 F.2d 606 (7th Cir. 1956) .....	71
17	Greene v. Bangor Bldg. Trades Council, 165 F.Supp. 902 (N.D.Me. 1958) .....	15,62
19	Hawaiian Oke & Liquors v. Joseph E. Seagram & Sons, 1967 CCH Trade Cas.Par. 72186 (D.Hawaii 1967) .....	45
21	Hoban v. Local 559, Int'l. Bhd. of Teamsters, 55 CCH Trade Cas.Par. 12007 (D.Conn. 1967) .....	42
22	Hoffritz v. United States, 240 F.2d 109 (9th Cir. 1956) .....	69,70
24	Industrial Electric Corp. v. Cline, 330 F.2d 489 (3rd Cir. 1964) .....	71
25	Jaffe v. Henry Heide, Inc., 115 F.Supp. 52 (S.D.N.Y. 1953) .....	63





J. G. Roy & Sons, 116 NLRB 286 (1957) .....	31
J. G. Roy & Sons Co. v. NLRB, 251 F.2d 771 (1st Cir. 1958) .....	32
Kennedy v. Los Angeles Joint Exec. Bd. of Hotel & Restaurant Employees, 192 F.Supp. 339 (S.D.Cal. 1961) .....	14, 62, 75
LeBaron v. Los Angeles Bldg. & Constr. Trades Council, 84 F.Supp. 629 (S.D.Cal. 1949), <u>aff'd</u> , 185 F.2d 405 (9th Cir. 1950) .....	17
Local Joint Board, Hotel and Restaurant Employees v. Sperry, 323 F.2d 75 (8th Cir. 1963) .....	17, 23, 25
Local No. 83, Construction Drivers Union v. Jenkins, 308 F.2d 516 (9th Cir. 1962) .....	13, 16, 21, 22, 62, 72
Local 450, Int'l. Union of Operating Engineers v. Elliott, 256 F.2d 630 (5th Cir. 1958) .....	15
Madden v. International Hod Carriers, 277 F.2d 688 (7th Cir., <u>cert. denied</u> , 364 U.S. 863 (1960) .....	23, 63
Madden v. International Organization of Masters, Mates & Pilots, 259 F.2d 312, 312, <u>cert. denied</u> , 358 U.S. 909 (1958) .....	22, 23
Madden v. Milk Wagon Drivers Union, Local 753, 229 F.Supp. 490 (N.D.Ill. 1964) .....	65
McLeod v. Business Machine & Office Appliance Machines Conf. Bd., 300 F.2d 237 (2nd Cir. 1962) ..	23
McLeod v. General Elec. Co., 366 F.2d 847 (2nd Cir. 1966) .....	24
McLeod v. Local 478, Int'l. Union of Operating Engineers, 278 F.Supp. 22 (D.Conn. 1967) .....	62
Miami Newspaper Printing Pressmen's Local No. 46 (Knight Newspapers, Inc.), 138 NLRB 1346 (1962) .....	35, 36, 56
Miami Newspaper Printing Pressmen's Local v. NLRB, 322 F.2d 405 (D.C.Dist. 1963) .....	38



1		
2	Miami Newspaper Printing Pressmen's Local v. NLRB, 322 F.2d 405 (D.C.Cir. 1963) .....	38
3		
4	Reines Distributors, Inc. v. Admiral Corp., 256 F.Supp. 581 (S.D.N.Y. 1966) .....	45
5	Retail Clerks Union, Local 137 v. Food Employers Council, Inc., 351 F.2d 525 (9th Cir. 1965) .....	12, 25, 48
6		
7	Retail, Wholesale & Dept. Store Union v. Rains, 266 F.2d 503 (5th Cir. 1959) .....	23
8		
9	Ross Whitney Corp. v. Smith, 207 F.2d 190 (9th Cir. 1953) .....	68, 70
10		
11	Roumell v. Miami Newspaper Printing Pressmen, 198 F.Supp. 851 (E.D.Mich. 1961) .....	36, 50
12		
13	Samoff v. Local Union No. 542-A, 238 F.Supp. 376 (W.D.Penn. 1964), <u>aff'd.</u> 341 F.2d 589 (3rd Cir. 1965) .....	18
14		
15	Schauffler v. Highway Truck Drivers & Helpers, 230 F.2d 7 (3rd Cir. 1956) .....	23
16		
17	Schauffler v. Local No. 677, Int'l. Union, United Automobile, Aircraft & Agricultural Implement Workers, 201 F.Supp. 637 (E.D. Penn. 1961) .....	19, 50
18		
19	Schauffler v. Local 1291, Int'l. Longshoremen's Ass'n., 292 F.2d 182 (3rd Cir. 1961) .....	17, 21, 23, 25
20		
21	Sims v. Greene, 161 F.2d 87 (3rd Cir. 1947) .....	69, 71
22		
23	Sperry v. Local Joint Bd., Hotel & Restaurant Employees Union, 216 F.Supp. 263 (W.D.Mo.) <u>aff'd.</u> 323 F.2d 75 (8th Cir. 1963) .....	18
24		
25	United States v. Arnold, Schwinn & Co., 388 U.S. 365 (1967) .....	44
26		
	United States v. Johns-Manville Corp., 259 F.Supp. 440 (E.D.Penn. 1966) .....	60
	United States v. Johns-Manville Corp., 237 F.Supp. 893 (E.D.Penn. 1965) .....	60



Waldron v. British Petroleum Co., Ltd., 4 F.R.Serv.2d 306.23, Case 1 (S.D.N.Y. 1961) .....	61
Warehousemen's Union Local v. Hoffman, 302 F.2d 352 (9th Cir. 1962) .....	73, 75
Warner Bros. Pictures v. Gittone, 110 F.2d 292 (3rd Cir. 1940).....	71
William Randolph Hearst, et al., 2 NLRB 530 (1937) .....	55

### Rules

Federal Rules of Civil Procedure, Rule 30(b).....	59
Federal Rules of Civil Procedure, Rule 43(e).....	70, 73
Federal Rules of Civil Procedure, Rule 56 .....	60, 70

### Statutes

National Labor Relations Act, § 8(b)(4)(1) (11)(B), 29 U.S.C. § 158(b)(4)(1)(11)(B).....	2
National Labor Relations Act, § 10(1), 29 U.S.C. § 160(1) .....	1
Norris-LaGuardia Act, § 7 29 U.S.C. § 107.....	73

### Congressional Record

93 Cong.Rec. 4887, 5036, 5039 .....	73
93 Cong.Rec. 5037, 5039, 5058 .....	74





1 UNITED STATES COURT OF APPEALS

2 FOR THE NINTH CIRCUIT

3  
4 SAN FRANCISCO-OAKLAND  
5 NEWSPAPER GUILD, et al.,

6 Appellants,

7 vs.

8 NOS. 22767  
9 22768  
10 22769

11 RALPH E. KENNEDY, REGIONAL  
12 DIRECTOR OF REGION 21 of  
13 the National Labor Relations  
14 Board, for and on behalf of  
15 the NATIONAL LABOR  
16 RELATIONS BOARD, et al.,

17 Appellees.  
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27 BRIEF OF CHARGING PARTIES - APPELLEES

28 PRELIMINARY STATEMENT

29 This is an appeal from an order and supplemental  
30 order of the United States District Court for the Northern  
31 District of California entered in proceedings which were  
32 instituted on behalf of the National Labor Relations Board  
33 against Appellants pursuant to Section 10(1) of the  
34 National Labor Relations Act (29 U.S.C. § 160 (1)).  
35 Appellee Ralph E. Kennedy, Regional Director of Region 21  
36 of the Board, petitioned the District Court seeking a pre-  
37 liminary injunction interlocutory to the final disposition  
38 of charges filed with the Board by the Los Angeles Herald-





1 Examiner and the San Francisco Examiner ("Charging  
2 Parties") alleging that Appellants had engaged in, and  
3 were engaging in, unfair labor practices within the meaning  
4 of Section 8(b)(4)(1)(11)(B) of the Act (29 U.S.C. § 158(b)  
5 (4)(1)(11)(B)). The order and supplemental order by the  
6 court below, granting the preliminary injunction, were  
7 entered on February 7 and February 8, 1968, pursuant to  
8 findings of fact and conclusions of law made and filed  
9 on February 7, 1968. This court's jurisdiction, on appeal  
10 from those orders, is invoked under Sections 1291 and 1292  
11 of Title 28 of the United States Code.

12 Subsequent to the filing of Notice of Appeal by  
13 Appellants, the Charging Parties moved to intervene as  
14 Appellees, and permission for the same was granted by this  
15 Court on April 19, 1968. This Brief is accordingly filed  
16 on behalf of Charging Parties - Appellees.

#### 17 18 STATEMENT OF THE CASE

19 The Los Angeles Herald-Examiner (herein called  
20 the "Herald-Examiner") publishes a daily and Sunday news-  
21 paper in Los Angeles, California. It is an independent  
22 division of The Hearst Corporation. The San Francisco  
23 Examiner (herein called the "Examiner"), publishes a daily  
24 newspaper in San Francisco, California, and also publishes  
25 a Sunday newspaper jointly with the Chronicle Publishing  
26 Company. The Chronicle Publishing Company (herein called



1 "Chronicle"), a Nevada corporation, publishes a daily news-  
2 paper in San Francisco known as The Chronicle. The San  
3 Francisco Newspaper Printing Company (herein called "Print-  
4 ing Company"), a Nevada corporation, is located in San  
5 Francisco and is engaged in the business of newspaper print-  
6 ing. It performs the mechanical, circulation, advertising,  
7 accounting, credit and collection functions for both the  
8 Examiner and the Chronicle.

9 On or about December 15, 1967, the Appellant labor  
10 organizations, with the exception of the San Francisco-  
11 Oakland Newspaper Guild, commenced picketing the plant and  
12 premises of the Los Angeles Herald-Examiner in support of  
13 a labor dispute with that newspaper. Subsequently, on or  
14 about January 5, 1968, and for the purpose of supporting  
15 the labor dispute with the Herald-Examiner, Appellants  
16 commenced picketing the San Francisco plants and premises  
17 of the Examiner, the Chronicle and the Printing Company  
18 and distributing hand bills to employees and the public at  
19 those locations. Appellant San Francisco-Oakland News-  
20 paper Guild orally instructed its members employed by the  
21 Printing Company to engage in work stoppages and refusals  
22 to perform services for their employer. As a result of  
23 these acts, the newspaper publication and printing  
24 facilities of the Examiner, the Chronicle and the Printing  
25 Company were shut down.



1 On January 5, and January 6, 1968 the Examiner  
2 and the Herald-Examiner filed charges and amended charges  
3 with the National Labor Relations Board, and filed addition-  
4 al charges on January 10, all alleging that Appellants  
5 had engaged in and were engaging in unfair labor practices  
6 prohibited by Section 8(b)(4)(i)(ii)(B) of the Act, which  
7 proscribes conduct in the nature of a secondary boycott.

8 After conducting a preliminary investigation, as  
9 required by Section 10(1) of the Act, Regional Director  
10 Kennedy concluded that there was reasonable cause to believe  
11 that Appellants had engaged in unfair labor practices under  
12 Section 8(b)(4)(i)(ii)(B) and that an unfair-labor-practice  
13 complaint should issue.\* Thereupon, pursuant to Section  
14 10(1) of the Act, Kennedy filed a petition in the Court  
15 below on behalf of the Board seeking a preliminary  
16 injunction pending final disposition of the proceedings  
17 before the Board. The petition for a preliminary  
18 injunction was supported by twenty affidavits, together  
19 with exhibits.

20 \_\_\_\_\_  
21 \*

22 On January 19, 1968 the complaint issued against  
23 Appellants based upon the charges filed by the Herald-  
24 Examiner and the Examiner, and is presently set for  
25 trial before a Trial Examiner of the Board commencing on  
26 May 20, 1968.





1           On January 12, 1968 the Court below issued an  
2 order requiring Appellants to show cause why an injunction  
3 should not issue enjoining and restraining them as prayed  
4 in the petition. That order provided that all evidence was  
5 to be presented by affidavits and that no oral testimony  
6 would be heard unless otherwise ordered by the Court.

7           On January 24, 1968 certain of the Appellants filed  
8 with the Court below a request for an order permitting  
9 depositions and/or interrogatories and/or compelling the  
10 attendance of eight named witnesses. On January 31, 1968  
11 the District Court, after hearing arguments on the afore-  
12 said request, denied the request. In rejecting this and a  
13 further request of Appellants for a continuance of the  
14 hearing to enable discovery, the Court concluded that to  
15 permit discovery by depositions or otherwise would at best  
16 create only conflicts in the evidence and raise credibility  
17 issues which would have to be resolved by the Board and  
18 which would not overcome the showing of reasonable cause  
19 that was clearly set forth in the petition and affidavits  
20 filed by Regional Director Kennedy.

21           On February 7, 1968, the District Court conducted  
22 a hearing on the petition, and after oral argument and  
23 consideration of the evidence, concluded that an injunction  
24 should issue. The Court entered findings of fact and  
25 conclusions of law on the same date, finding and concluding  
26 that there was, and that petitioner had, reasonable cause





1 to believe that the Herald-Examiner is operated independent-  
2 ly of the Examiner, of the Chronicle, and of the Printing  
3 Company; that there was, and that petitioner had, reasonable  
4 cause to believe that appellants' picketing, and other  
5 conduct, at the San Francisco plants and premises of the  
6 Examiner, the Chronicle and the Printing Company, in fur-  
7 therance of the dispute with the Herald-Examiner in Los  
8 Angeles, had an unlawful object and violated Section 8(b)(4)  
9 (1)(11)(B) of the Act.

#### 10 11 QUESTIONS PRESENTED

12 1. Whether it was clearly erroneous for the  
13 District Court to find and conclude that there is reasonable  
14 cause to believe that the Los Angeles Herald-Examiner is  
15 operated autonomously and independently of the San Francisco  
16 Examiner, the Chronicle, and the Printing Company, and  
17 that there is reasonable cause to believe that Appellants  
18 violated Section 8(b)(4)(1)(11)(B) of the Act.

19 2. Whether it was clearly erroneous for the  
20 District Court to deny the request of Appellants for an  
21 order permitting depositions and/or interrogatories and/or  
22 compelling the attendance of witnesses.

23 3. Whether it was clearly erroneous for the  
24 District Court to enter a show-cause order requiring that  
25 all evidence be presented by affidavits, unless otherwise  
26 ordered by the Court.

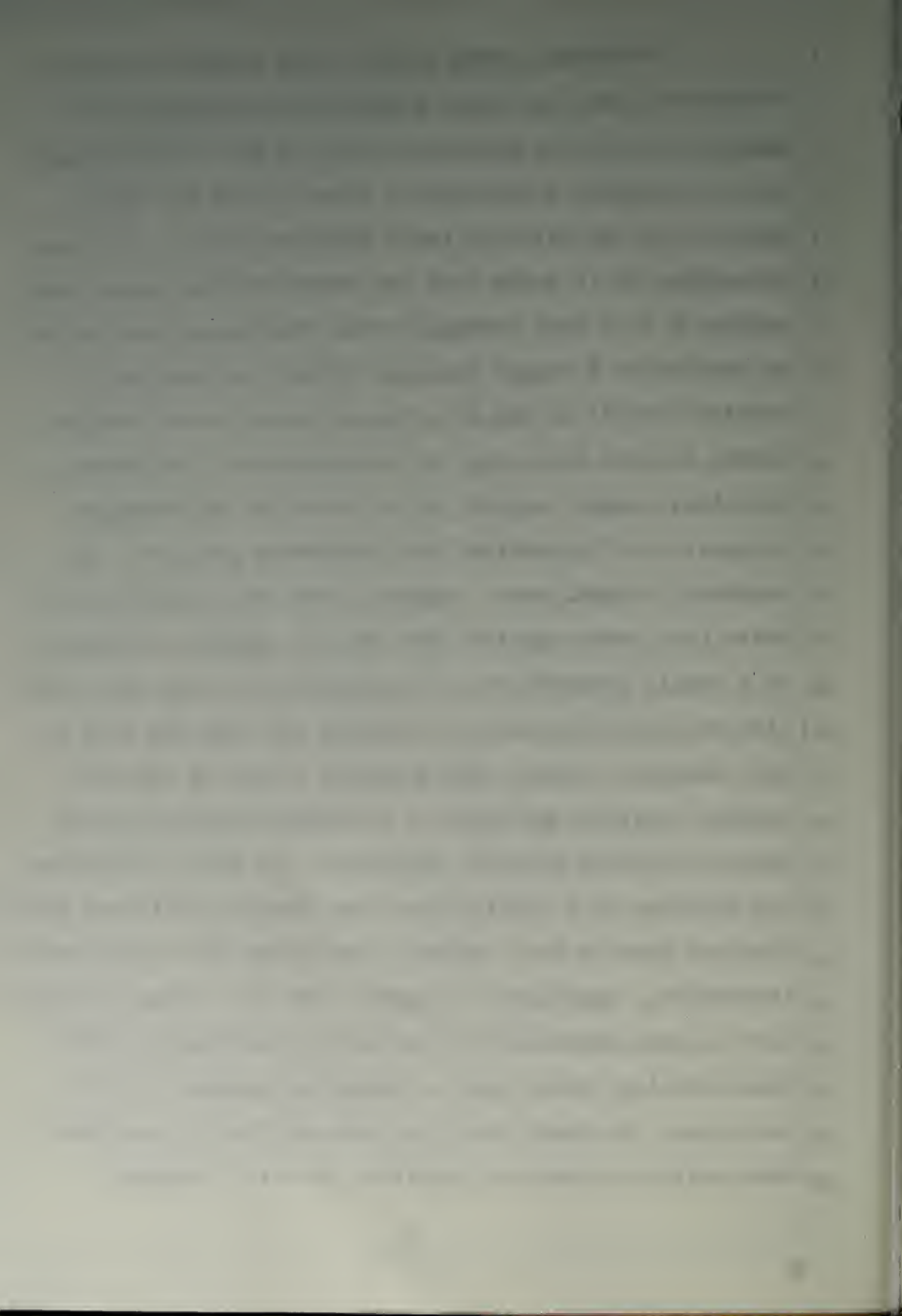


## SUMMARY OF ARGUMENT

As a subject for preliminary consideration, this brief first discusses the confined nature of the District Court's role in a Section 10(1) proceeding and the limited scope of review on an appeal from such proceeding. It is shown that the District Court in a Section 10(1) proceeding is merely required to determine whether there is reasonable cause to believe that an unfair labor practice enumerated in that section has been committed, and that this requirement is satisfied by the establishment of the elements of a prima facie case. The statutory standard of "reasonable cause" is met upon a showing by the Regional Director that the factual contentions and legal propositions underlying his petition are substantial and not frivolous. Thus, the question on appeal is not, as Appellants have asserted, whether the District Court erred in finding that the newspaper divisions of The Hearst Corporation are genuinely neutral employers and that there is reasonable cause to believe Appellants had violated the Act. The question before this Court is whether it was clearly erroneous for the District Court to find that there is reasonable cause to believe that the Herald-Examiner is operated autonomously and independently of the Examiner, the Chronicle and the Printing Company, and that there is reasonable cause to believe that Appellants have violated Section 8(b)(4)(i) (11)(B) of the Act.



Discussion then turns to the authorities which demonstrate that the legal proposition underlying the Regional Director's petition herein is not frivolous and that it presents a substantial issue of law for determination by the National Labor Relations Board. In this connection it is shown that the Board and the courts have adopted a rule that commonly owned enterprises are not to be considered a single employer within the meaning of Section 8(b)(4) of the Act, unless there is such active common control over them, as distinguished from merely a potential common control, as to denote an appreciable integration of operations and management policies. In response to Appellants' argument that the courts and the Board have never applied this rule to separate divisions of a single corporation, it is pointed out that this question has only been before the Board one time and that in that instance, rather than adopting a rule of law precluding separate divisions of a single corporation from being considered separate employers, the Board predicated its decision on a finding that the separate divisions there involved were in fact commonly controlled and operationally integrated. Appellants' argument that the "common control" test is only applicable in situations involving separate legal entities rests upon a fallacious premise that the courts and the Board will look through form to substance when multiple forms are involved, but will disregard





1 substance when only one legal form is involved.

2           Next, the brief examines the evidence which  
3 supports the District Court's findings that there is  
4 reasonable cause to believe that the Hearld-Examiner is in  
5 fact operated as an autonomous and independent division of  
6 The Hearst Corporation. In this connection, it is pointed  
7 out that Hearst is a conglomerate corporation consisting of  
8 many separate divisions, including newspaper publishing  
9 enterprises in seven different cities, a magazine division  
10 which publishes twelve magazines, three radio and television  
11 divisions operating in three separate cities, a newspaper  
12 feature syndicate, two real estate divisions operating  
13 in New York City and San Francisco, an international art  
14 and antiques division, a land and livestock division which  
15 manages western ranch properties and timberlands, a news-  
16 paper supplies division, and a specialty paper division  
17 which operates in Maine. The individual newspaper  
18 divisions are each managed and operated autonomously and  
19 independently of the others. Each newspaper is operated  
20 under the complete control of its own publisher assisted  
21 by his own separate executive staff. Each publisher  
22 or one of his executives negotiates and has complete  
23 control over the collective bargaining agreements of  
24 that enterprise. A review of this and other evidence  
25 conclusively demonstrates that at the very least a  
26 substantial factual issue exists for primary determination





1 by the National Labor Relations Board, and accordingly,  
2 that there was reasonable cause to believe that Appellants'  
3 conduct constituted a violation of Section 8(b)(4)(i)(ii)  
4 (B) of the Act. In no event could it be seriously contended  
5 that the District Court's ruling in this regard was clearly  
6 erroneous.

7 Finally, it is shown that the District Court did  
8 not abuse its discretion in denying Appellants' request for  
9 discovery and requiring that the show cause hearing be  
10 based on affidavits rather than oral testimony. It is  
11 pointed out that the District Court's role in a Section 10  
12 (1) proceeding is confined to determining whether there is  
13 reasonable cause, and that this requirement is met when the  
14 evidence establishes that there is a substantial factual  
15 issue to be determined by the National Labor Relations  
16 Board. The discovery requested by Appellants would at best  
17 have only created evidentiary conflicts or credibility  
18 issues which the District Court did not have jurisdiction  
19 to resolve. Many of the authorities relied upon by  
20 Appellants are cases in which the Board had not filed  
21 affidavits supporting its Section 10(1) petition, and  
22 limited discovery was allowed only for the purpose of  
23 insuring that respondents would not be surprised by the  
24 oral testimony which the Board intended to present at the  
25 hearing. In this case however, Appellants were furnished  
26 with all of the evidence upon which the Regional Director

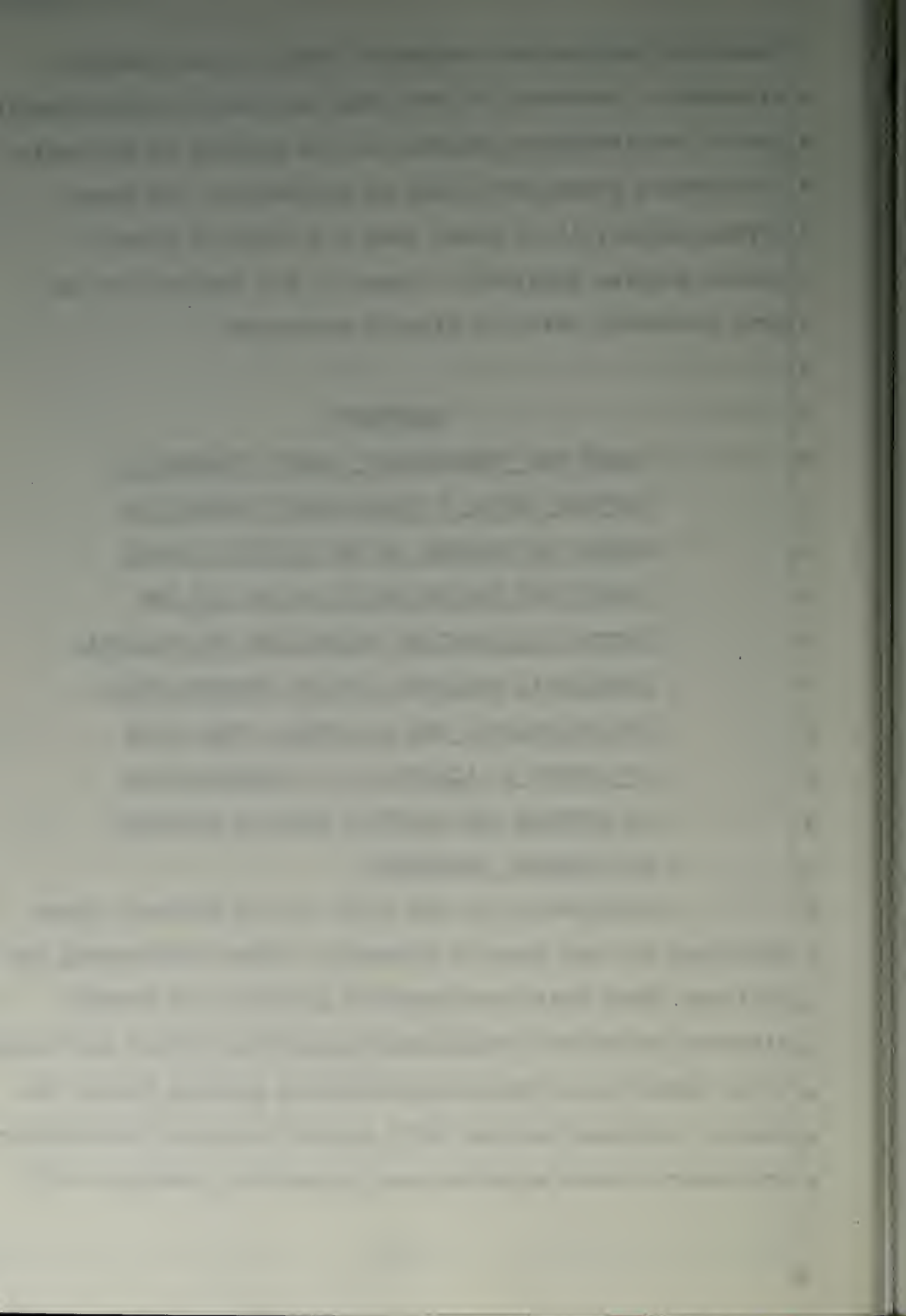


1 based his petition and there was thus no such need for  
2 discovery. Moreover, it has long been held in this Circuit  
3 that a preliminary injunction may be granted on the basis  
4 of evidence presented solely by affidavits. In these  
5 circumstances, it is clear that the District Court's  
6 orders denying Appellants' requests for depositions and  
7 oral testimony were not clearly erroneous.

### 8 9 ARGUMENT

10 I. UNDER THE "REASONABLE CAUSE" STANDARD OF  
11 SECTION 10(1), A PRELIMINARY INJUNCTION  
12 SHOULD BE GRANTED IF THE DISTRICT COURT  
13 FINDS THAT THE PROPOSITIONS OF LAW AND  
14 FACTUAL ALLEGATIONS UNDERLYING THE REGIONAL  
15 DIRECTOR'S PETITION ARE NOT INSUBSTANTIAL  
16 AND FRIVOLOUS, AND ON APPEAL, THE SCOPE  
17 OF REVIEW IS LIMITED TO A DETERMINATION  
18 OF WHETHER THE DISTRICT COURT'S FINDINGS  
19 ARE CLEARLY ERRONEOUS.

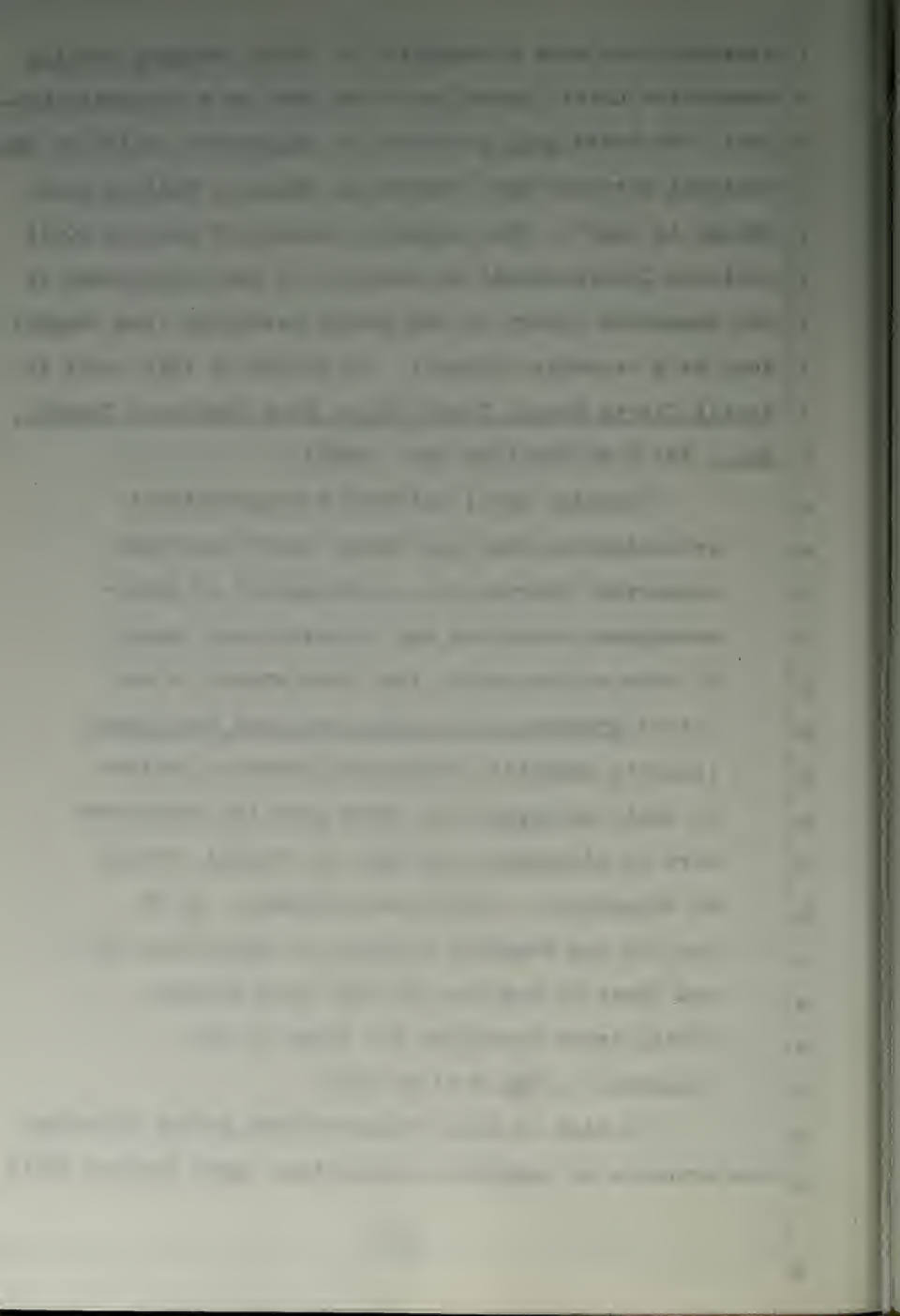
20 Sections 10(j) and 10(1) of the National Labor  
21 Relations Act set forth a statutory scheme authorizing the  
22 National Labor Relations Board to petition the federal  
23 district courts for preliminary injunctive relief ancillary  
24 to an unfair labor practice proceeding pending before the  
25 Board. Although Section 10(j) grants the Board discretion-  
26 ary power to seek a preliminary injunction, Section 10(1)



1 provides that when a complaint is filed charging certain  
2 enumerated unfair labor practices such as a secondary boy-  
3 cott, the Board must petition for injunctive relief if the  
4 Regional Director has "reasonable cause to believe such  
5 charge is true". This mandatory nature of Section 10(1)  
6 reflects Congressional recognition of the seriousness of  
7 the immediate injury to the public resulting from conduct  
8 such as a secondary boycott. As stated by this court in  
9 Retail Clerks Union, Local 137 v. Food Employers Council,  
10 Inc., 351 F.2d 525 (9th Cir. 1965):

11 "Section 10(1) reflects a Congressional  
12 determination that the unfair labor practices  
13 enumerated therein are so disruptive of labor-  
14 management relations and threaten such danger  
15 of harm to the public that they should be en-  
16 joined whenever a district court has been shown  
17 [court's emphasis] reasonable cause to believe  
18 in their existence and finds that the threatened  
19 harm or disruption can best be avoided through  
20 an injunction. [Citations omitted]. It is  
21 not for the Regional Director to substitute his  
22 own ideas of how best to deal with alleged  
23 unfair labor practices for those of the  
24 Congress." (351 F.2d at 531).

25 In view of this "Congressional policy favoring  
26 the granting of temporary injunctions under Section 10(1)

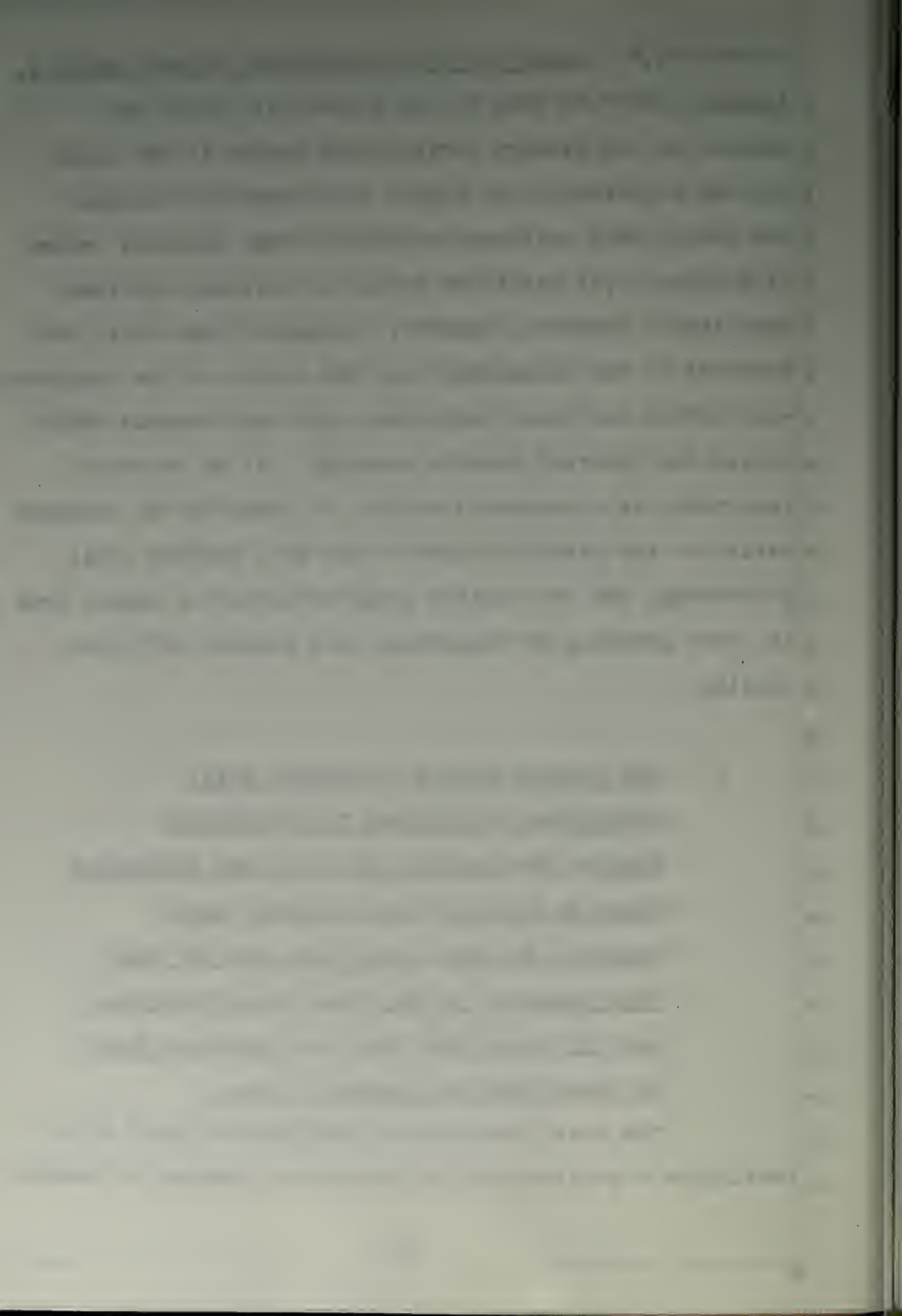




1 of the Act," (Local No. 83, Construction Drivers Union v.  
2 Jenkins, 308 F.2d 516, 517 fn.1 (9th Cir. 1962) and  
3 because of the primary jurisdiction vested in the Board  
4 for the adjudication of unfair labor practice charges,  
5 the courts have uniformly recognized that judicial review  
6 of Section 10(1) petitions should be narrowly confined.  
7 Appellants' argument, however, disregards this fact, and  
8 proceeds on the assumption that the merits of the complaint  
9 were before the Court below that this Court should fully  
10 review the District Court's findings. It is therefore  
11 important, as a threshold matter, to focus on the confined  
12 nature of the District Court's role in a Section 10(1)  
13 proceeding, and the limited scope of review on appeal from  
14 an order granting an injunction in a Section 10(1) pro-  
15 ceeding.

16  
17 A. The Court's Role In A Section 10(1)  
18 Proceeding Is Confined To Determining  
19 Whether The Regional Director Has Reasonable  
20 Cause To Believe That An Unfair Labor  
21 Practice Has Been Committed. And All That  
22 This Requires Is The Prima Facie Establish-  
23 ment Of Facts From Which An Inference Might  
24 Be Drawn That The Charge Is True.

25 The sole issue before the District Court at a  
26 hearing on a petition for an injunction pursuant to Section





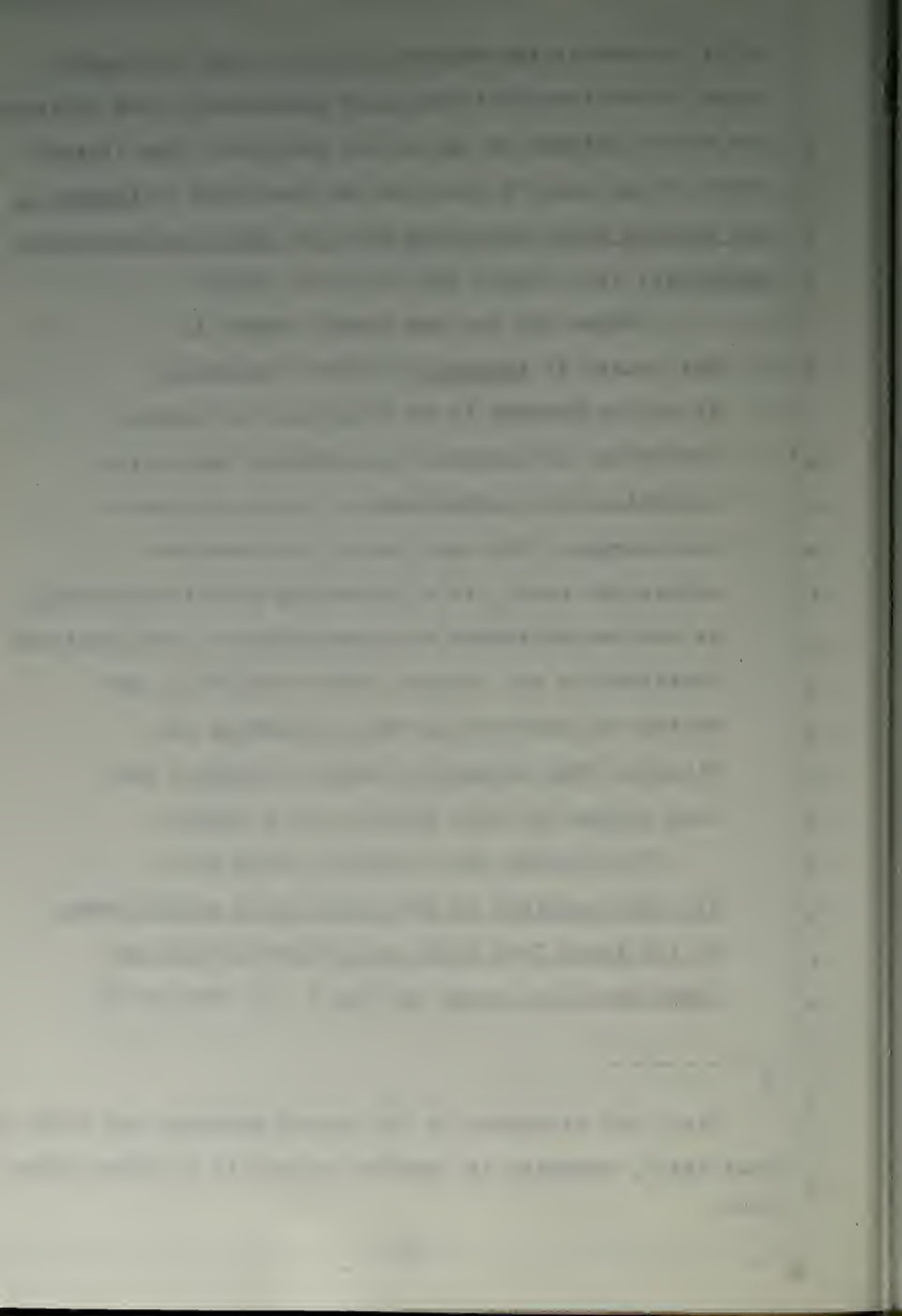
1 10(1) is whether the Regional Director has "reasonable  
2 cause" to believe that the named respondents have violated  
3 the Act as alleged by him in his petition. The limited  
4 scope of the court's function was described in Kennedy v.  
5 Los Angeles Joint Executive Board of Hotel and Restaurant  
6 Employees, 192 F.Supp. 339 (S.D.Cal. 1961):

7 "Under the Act the remedy sought in  
8 the courts is temporary [Court's emphasis]  
9 in nature because it is effective only until  
10 the Board, in adversary proceedings before it,  
11 determines the correctness or incorrectness of  
12 the charges. For this reason the question  
13 before the court, in a proceeding of this character,  
14 is not the existence or nonexistence of the practices  
15 contained in the charges before the Board, but  
16 whether in instituting this proceeding the  
17 Director 'has reasonable cause to believe that  
18 such charge is true' 29 U.S.C.A. § 160(1).

19 "The courts have uniformly held that  
20 all this requires is the prima facie establishment  
21 of the facts from which an inference might be  
22 drawn that the charge is true.\* If this be so,

23  
24 \*

25 Here, and elsewhere in the quoted passages set forth in  
26 this Brief, emphasis is supplied unless it is noted other-  
wise.



1 in,junction issues, whether the charges are  
2 ultimately proved true in the proceedings  
3 before the Director or not." (192 F.Supp.  
4 at 341).

5 In order to establish the factual elements of  
6 "a prima facie case" it is not necessary for the Regional  
7 Director "to present uncontradicted testimony". Local 450,  
8 International Union of Operating Engineers v. Elliott, 256  
9 F.2d 630, 638 (5th Cir. 1958). "Credible evidence,  
10 establishing a prima facie case, is sufficient." Greene  
11 v. Bangor Building Trades Council, 165 F.Supp. 902, 903  
12 (N.D.Me. 1958). Nor is it necessary that the Regional  
13 Director establish the factual elements of his charge by  
14 a preponderance of the evidence:

15 "No preponderance of the evidence is  
16 necessary, merely a showing of 'reasonable  
17 cause', [Citation omitted] and the Court may  
18 not resolve conflicting factual evidence and  
19 questions of credibility if the Board might  
20 reasonably resolve those issues in favor of  
21 the plaintiff . . ." (Fusco v. Richard W. Kaase  
22 Baking Co., 205 F.Supp. 459, 463 (N.D.Ohio 1962)  
23 [Commenting on the analogous "reasonable cause"  
24 requirement under Section 10(j)].

25 Thus, as this Court has stated, if the pleadings  
26 raise a substantial issue of fact, that in itself is



1 sufficient to establish reasonable cause:

2 "Ordinarily a dispute as to a material  
3 question of fact precludes a judgment on the  
4 pleadings, but the dispute as to the question  
5 raised by the pleadings in the instant case  
6 was not within the providence of the District  
7 Court to resolve; it was one for the Board to  
8 decide. It seems apparent, and the District  
9 Court so found, that the Board could find either  
10 that the certification covered the three Goodrich  
11 employees at the Union Rock plant or that it did  
12 not. That being the case, there existed reasonable  
13 cause raised by the pleadings that Appellant was  
14 engaging in unfair labor practice, thus justifying  
15 the issuance of the injunction." (Local No. 83,  
16 Construction Drivers Union v. Jenkins, 308 F.2d  
17 516, 517 (9th Cir. 1962).

18 Thus, the District Court need not find that there  
19 is a probability that the National Labor Relations Board  
20 will resolve disputed questions of fact in favor of the  
21 petitioner, but merely that there is sufficient evidence  
22 from which the Board could find a violation of law.

23 "The phrases 'reasonable cause' or  
24 'reasonable grounds' are standard in law.  
25 Their meaning, when made a conclusion for  
26 action, has long been established. The

ORIGINAL ARTICLES

THE EFFECT OF THE VARIOUS TYPES OF EXERCISE ON THE  
HEART AND CIRCULATION

BY DR. J. H. HARRIS, JR., ST. LOUIS, MO.

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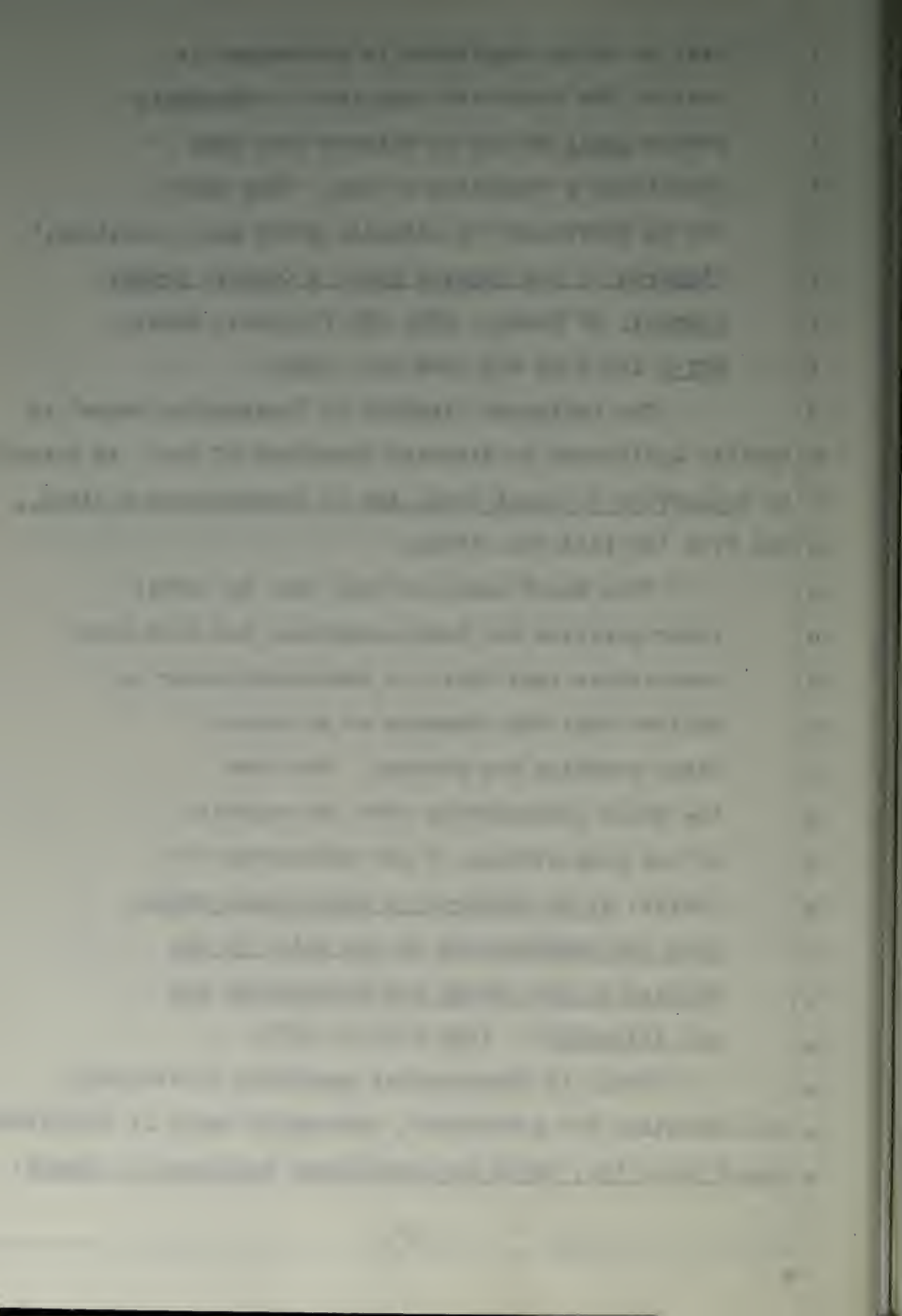


1 test by which compliance is determined is  
2 whether the facts are such that a reasonable  
3 person could be led to believe that they  
4 constitute a violation of law. They need  
5 not be sufficient to actually prove such violation."  
6 (LeBaron v. Los Angeles Bldg. & Constr. Trades  
7 Council, 84 F.Supp. 629, 635 (S.D.Cal. 1949),  
8 aff'd 185 F.2d 405 (9th Cir. 1950).

9 The statutory standard of "reasonable cause" is  
10 equally applicable to disputed questions of law. As stated  
11 in Schauffler v. Local 1291, Int'l. Longshoremen's Ass'n.,  
12 292 F.2d 182 (3rd Cir. 1961):

13 "The Board need not show that an unfair  
14 labor practice has been committed, but need only  
15 demonstrate that there is reasonable cause to  
16 believe that the elements of an unfair  
17 labor practice are present. Nor need  
18 the Board conclusively show the validity  
19 of the propositions of law underlying its  
20 charge; it is required to demonstrate merely  
21 that the propositions of law which it has  
22 applied to the charge are substantial and  
23 not frivolous." (292 F.2d at 187).

24 Thus, if "substantial questions of statutory  
25 determination are presented", reasonable cause is established  
26 Local Joint Bd., Hotel and Restaurant Employees v. Sperry,



1 323 F.2d 75, 77 (8th Cir. 1963); Samoff v. Local Union No.  
2 542-A, 238 F.Supp. 376, 382 (M.D.Penn. 1964), aff'd., 341  
3 F.2d 589 (3d Cir. 1965). The Regional Director need only  
4 show that the legal propositions underlying his petition  
5 have some basis in reason, not that they are the correct  
6 interpretation of the Act. Reasonable cause is established  
7 if the Director shows that there is a reasonable possibility  
8 that the Board might adopt his interpretation of the Act.

9 " . . . [I]t appears that the existence  
10 of a possible reasonable interpretation  
11 of the Act which would make the conduct  
12 of the union subject to complaint of an  
13 unfair labor practice would, of itself,  
14 suggest that the Board would have reasonable  
15 cause to believe that an unfair labor  
16 practice has been committed. . . . [W]here  
17 a reasonable interpretation of the Act might  
18 render the union guilty of an unfair labor practice,  
19 and the Court is of the opinion that such a  
20 reasonable interpretation might exist in this  
21 case, the ultimate issues, legal as well  
22 as factual, should be left to the decision  
23 of the Board. (Sperry v. Local Joint Bd.  
24 Hotel and Restaurant Employees Union, 216 F.  
25 Supp. 263, 266 (W.D.Mo.), aff'd. 323 F.2d 75  
26 (8th Cir. 1963)).



1 Even where the proposition of law advanced by  
2 the Regional Director is "novel", a Section 10(1) injunction  
3 should issue unless the inferences to be drawn from the  
4 decided cases completely exclude the possibility that his  
5 interpretation of the Act will be adopted by the Board.

6 ". . . [T]he Board is 'the primary interpreter  
7 of the statutory scheme', a function which  
8 should not be usurped by the District Court  
9 in determining 'novel questions of labor law'.

10 Obviously, where, as here, the question of  
11 law is 'novel', this Court perforce does  
12 not have the benefit of the Board's, or of  
13 any other, opinion. The statutory scheme  
14 does not contemplate a definitive decision  
15 by the District Court under such circumstances.

16 We must decide only whether the Board's  
17 position is reasonable and not frivolous.

18 Here, the Board's legal position may be  
19 uncertain when tested by appropriate legal  
20 standards [Citations omitted]. However,  
21 we do not believe that it is either unreasonable  
22 or frivolous, since the inferences to be drawn  
23 from the decided cases do not completely  
24 exclude the possibility that the Board's  
25 position is correct." (Schauffler v. Local  
26 No. 677, Int'l. Union, United Automobile,

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1 Aircraft & Agricultural Implement Workers,

2 201 F.Supp. 637, 638 (E.D.Penn. 1961).

3 The legal premise underlying the Regional Director's  
4 petition in this case is that different and autonomous  
5 divisions of a single corporation may be considered separate  
6 employers within the meaning of Section 8(b)(4)(B) of the  
7 Act. Appellants' brief incorrectly assumes that the  
8 District Court's order herein must be predicated upon a  
9 finding "that the Board will adopt such a rule." (Appellants'  
10 Brief, pp. 8, 11). To the contrary, however, the District  
11 Court was only required to find a reasonable possibility,  
12 and not a probability, that the Board would adopt the  
13 Regional Director's interpretation of the Act. The question  
14 before the District Court was not whether the Board would  
15 adopt the rule of law relied upon by the Regional Director  
16 but whether the Board reasonably could adopt that rule.

17 So much for the "reasonable cause" standard of  
18 Section 10(1). We turn now to the related, but distinct,  
19 question of the limited scope of Appellate review which  
20 results in a further narrowing of the issues to be considered  
21 by this Court.

22 B. Upon Appeal From An Order Granting A  
23 Preliminary Injunction Pursuant To  
24 Section 10(1), The District Court's  
25 Finding Of "Reasonable Cause" Will Not  
26 Be Set Aside Unless The Same Is Clearly Erroneous.

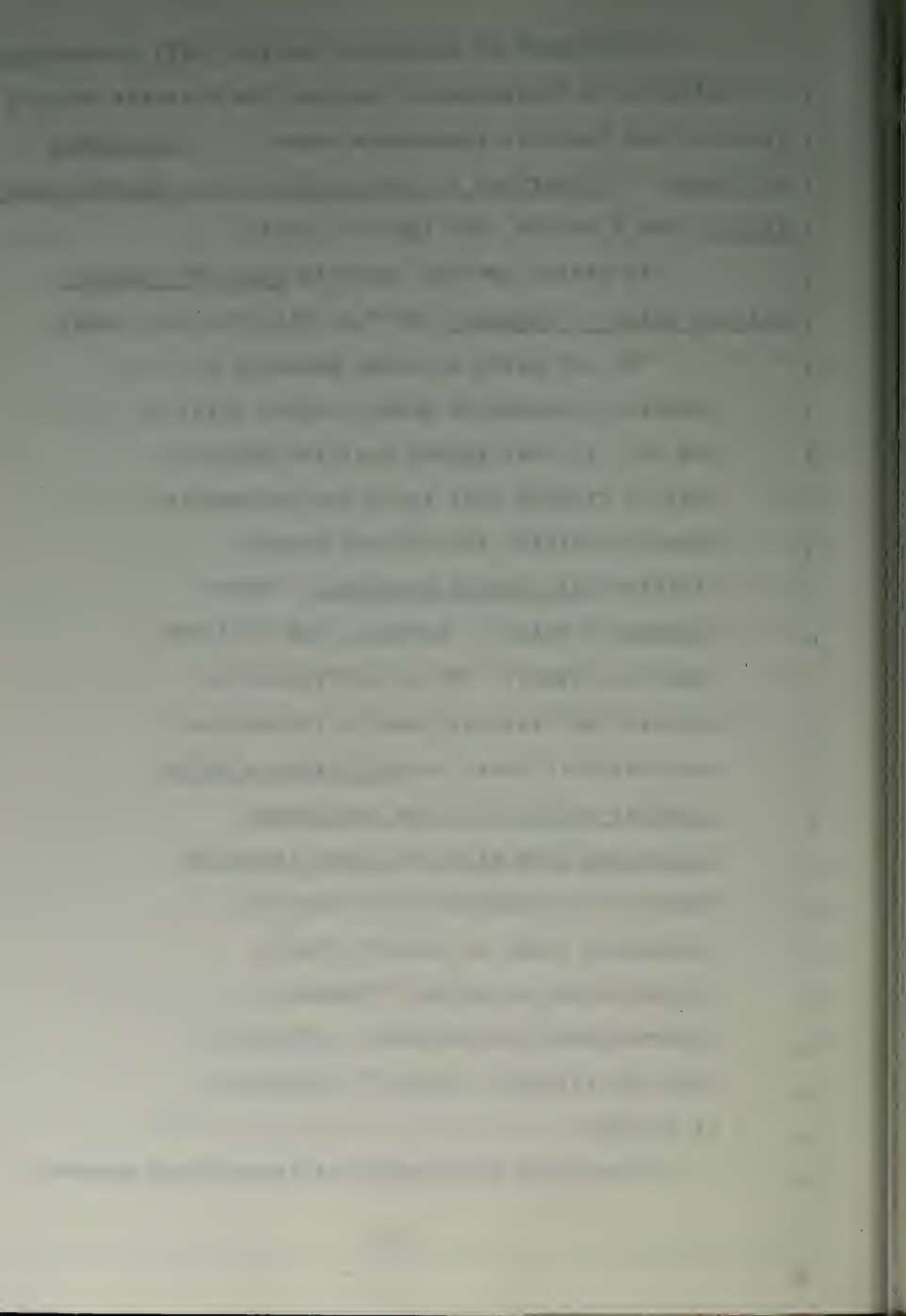
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1 "The scope of review of Section 10(1) proceedings  
2 is limited to a determination whether the district court's  
3 finding that there is reasonable cause . . . is clearly  
4 erroneous." Schauffler v. Local 1291, Int'l. Longshoremen's  
5 Ass'n., 292 F.2d 182, 187 (3d Cir. 1961).

6 As stated by this court in Local 83, Constr.  
7 Drivers Union v. Jenkins, 308 F.2d 516 (9th Cir. 1962):

8 "To set aside an order granting a  
9 temporary injunction under Section 10(1) of  
10 the Act, it must appear that the District  
11 Court's finding that there was reasonable  
12 cause to believe the Act was being  
13 violated was clearly erroneous. Ware-  
14 housemen's Union v. Hoffman, 302 F.2d 352  
15 (9th Cir. 1962). 'It is sufficient to  
16 sustain the District Court's finding and  
17 conclusion if there be any evidence which  
18 together with all of the reasonable  
19 inferences that might be drawn therefrom  
20 supports a conclusion that there is  
21 reasonable cause to believe that a  
22 violation has occurred.' Madden v.  
23 International Hod Carriers, 277 F.2d  
24 688, 692 (7th Cir. 1960)." (308 F.2d  
25 at 517-18).

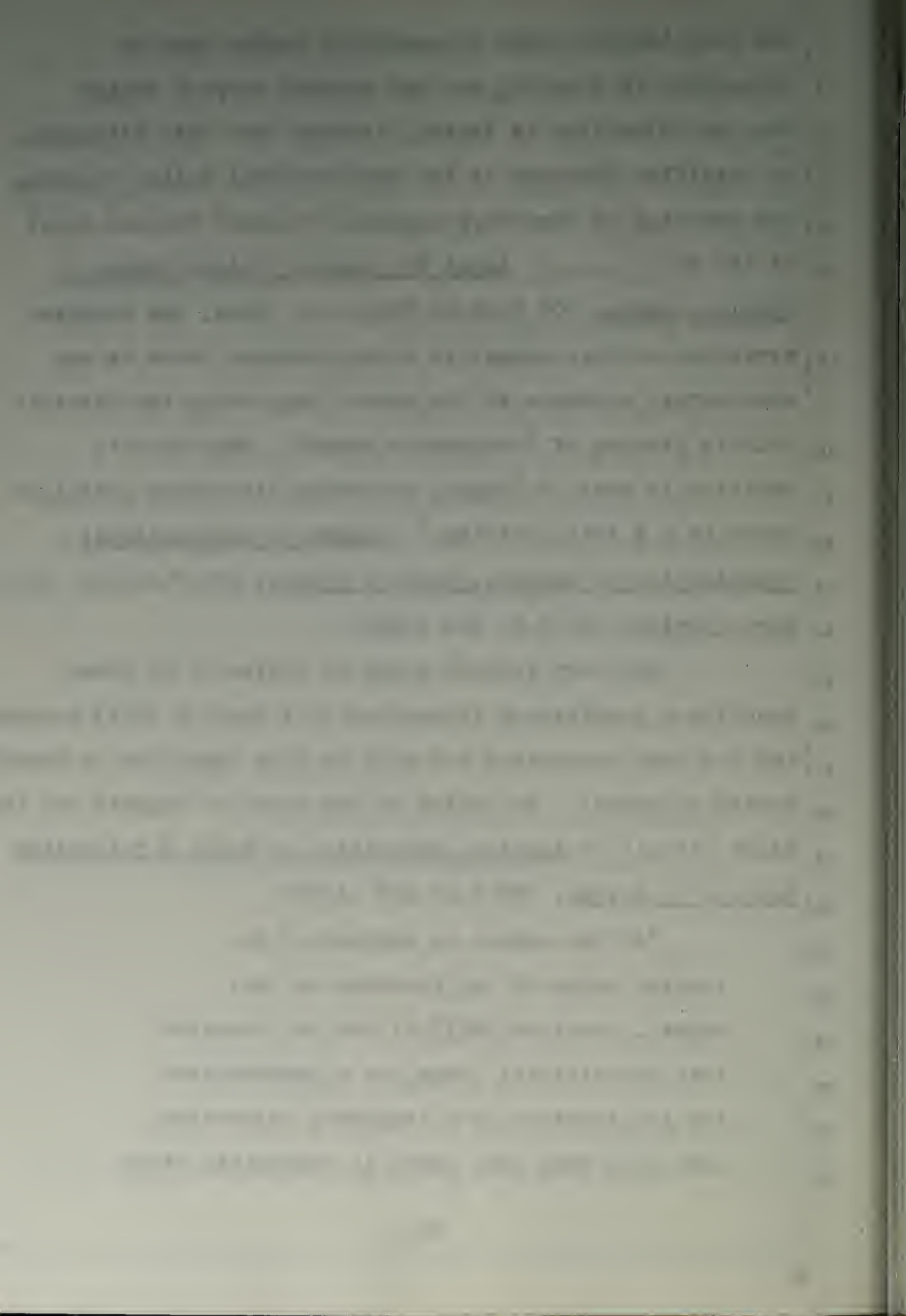
26 This Court has clearly differentiated between



1 the very limited scope of appellate review when an  
2 injunction is granted, and the broader scope of review  
3 when an injunction is denied, stating that this difference  
4 is justified "Because of the Congressional policy favoring  
5 the granting of temporary injunctions under Section 10(1)  
6 of the Act . . . ." Local 83, Constr. Drivers Union v.  
7 Jenkins, supra, 308 F.2d at 517, n.1. Thus, the question  
8 presented on this appeal is merely whether there is any  
9 substantial evidence in the record supporting the District  
10 Court's finding of "reasonable cause". This Court's  
11 function is that of "simply reviewing discretion exercised  
12 below in a § 10(1) setting." Madden v. International  
13 Organization of Masters, Mates & Pilots, 259 F.2d 312, 313,  
14 cert. denied, 358 U.S. 909 (1958).

15 The very limited scope of review of an order  
16 granting a preliminary injunction in a Section 10(1) proceed-  
17 ing had been recognized not only by this Court but by other  
18 courts of appeal. As stated by the Court of Appeals for the  
19 Sixth Circuit in American Federation of Radio & Television  
20 Artists v. Getreu, 358 F.2d 698 (1958):

21 "At the outset we emphasized the  
22 limited scope of our function on this  
23 appeal. Section 10(1) of the Act requires  
24 that the district judge, as a prerequisite  
25 for the issuance of a temporary injunction,  
26 need only find that there is reasonable cause





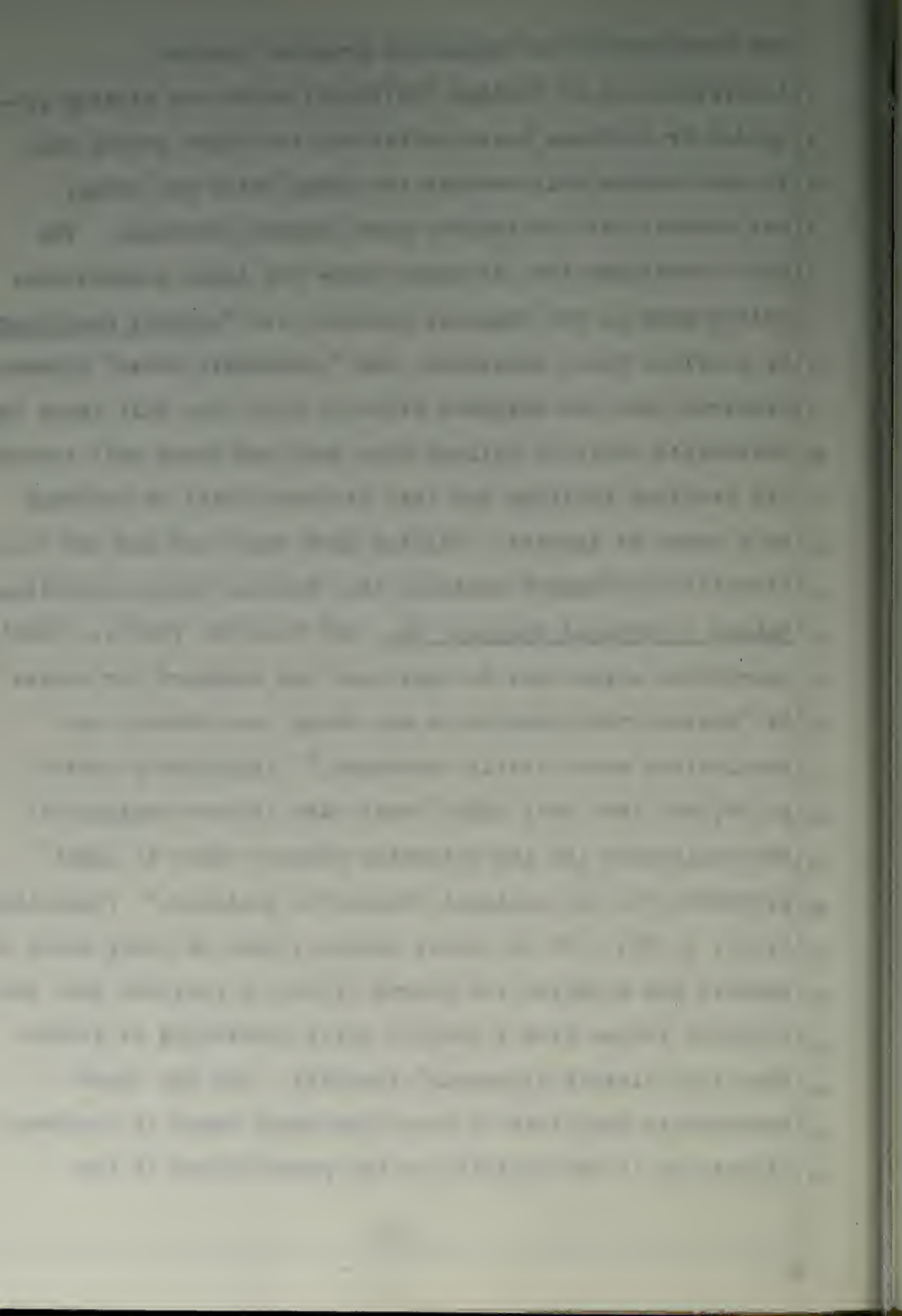
1 to believe that a violation of Section 8(b)  
2 (4)(A) of the Act as charged has been  
3 committed. . . . Review here is further  
4 confined by Rule 52(a), F.R.Civ.P., 28  
5 U.S.C.A., to determining whether the District  
6 court's finding of reasonable cause was  
7 clearly erroneous." (258 F.2d at 699).

8 To the same effect are: Warehousemen's Union  
9 Local 6 v. Hoffman, 302 F.2d 352, 354 (9th Cir. 1962);  
10 Schauffler v. Local 1291, Int'l. Longshoremen's Ass'n.,  
11 292 F.2d 182, 187 (3d Cir. 1961); Madden v. International  
12 Hod Carriers, 277 F.2d 688 (7th Cir.), cert. denied, 364  
13 U.S. 863 (1960); Madden v. International Organization of  
14 Masters, Mates & Pilots, 259 F.2d 312, cert. denied, 358  
15 U.S. 909 (1958); Angle v. Sacks, 382 F.2d 655 (10th Cir. 1967)  
16 Retail, Wholesale & Dept. Store Union v. Rains, 266 F.2d  
17 503, 506 (5th Cir. 1959); Schauffler v. Highway Truck Drivers  
18 & Helpers, 230 F.2d 7, 9 (3d Cir. 1956); Local Joint Bd.,  
19 Hotel and Restaurant Employees v. Sperry, 323 F.2d 75, 77  
20 (8th Cir. 1963).

21 In contrast to the above cases, the only court  
22 which has held that the "clearly erroneous" standard is  
23 inapplicable to appeals from a Section 10(1) proceeding  
24 is the Court of Appeals for the Second Circuit. In McLeod  
25 v. Business Machine & Office Appliance Machines Conf. Bd.,  
26 300 F.2d 237 (2d Cir. 1962), where the Regional Director



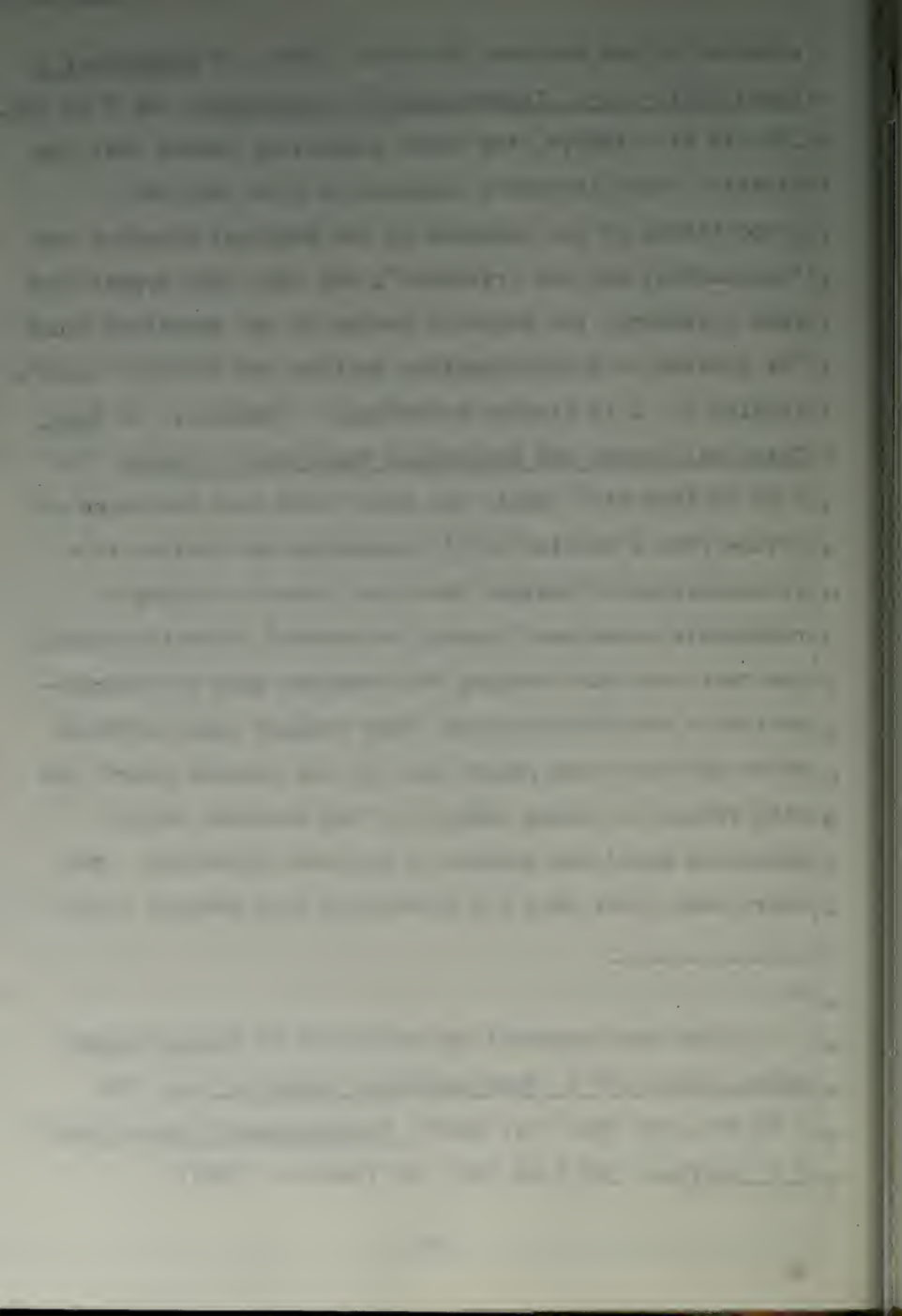
1 had been granted an injunction premised upon an  
2 interpretation of Section 8(b)(4)(B) which was clearly pre-  
3 cluded by previous Board decisions, the court stated that  
4 it need decide only whether the judge below was wrong,  
5 not whether his conclusions were clearly erroneous. The  
6 Court concluded that in cases where the legal propositions  
7 relied upon by the Regional Director are "clearly precluded"  
8 by previous Board decisions, the "reasonable cause" standard  
9 requires that the Regional Director must show that there is  
10 reasonable cause to believe both that the Board will reverse  
11 its previous position and that its order will be enforced  
12 by a court of appeals. Relying upon this case and the Second  
13 Circuit's subsequent decision in a Section 10(j) proceeding,  
14 McLeod v. General Electric Co., 366 F.2d 847 (2d Cir. 1966),  
15 Appellants argue that in this case the standard for review  
16 is "whether the judge below was wrong, not whether his  
17 conclusions were clearly erroneous," (Appellants' Brief  
18 p. 24) and that this Court "must make its own analysis of  
19 the applicable law and determine whether there is legal  
20 precedent for the Regional Director's position." (Appellants'  
21 Brief, p. 29). It is clear, however, that no other court of  
22 appeals has accepted the Second Circuit's position that the  
23 scope of review from a Section 10(l) proceeding is broader  
24 than the "clearly erroneous" standard. And the cases  
25 demonstrate that this is true even where there is substantial  
26 dispute as to the validity of the propositions of law



1 advanced by the Regional Director. Thus, in Schaffler v.  
2 Local 1291, Int'l. Longshoremen's Association, 290 F.2d 182,  
3 187 (3d Cir. 1961)\*, the court explicitly stated that the  
4 district court is merely required to find that the  
5 propositions of law advanced by the Regional Director are  
6 "substantial and not frivolous", and that upon appeal from  
7 such a finding, the scope of review by the appellate court  
8 "is limited to a determination whether the district court's  
9 finding . . . is clearly erroneous." Similarly, in Local  
10 Joint Bd., Hotel and Restaurant Employees v. Sperry, 323  
11 F.2d 75 (8th Cir. 1963), the court held that the scope of  
12 review from a Section 10(1) proceeding was limited to a  
13 determination of whether the trial court's finding of  
14 reasonable cause was "clearly erroneous", notwithstanding  
15 the fact that such finding was premised upon an interpre-  
16 tation of the Act involving "many complex legal problems  
17 which have not been passed upon by the Supreme Court" and  
18 with respect to which members of the National Labor  
19 Relations Board had divided in previous decisions. The  
20 court made clear that its discussion with respect to the

21  
22 \*

23 Cited with approval by this court in Retail Clerks  
24 Union, Local 137 v. Food Employers Council, Inc., 351  
25 F.2d 525, 531 (9th Cir. 1965); Warehousemen's Union Local  
26 6 v. Hoffman, 302 F.2d 352, 353 (9th Cir. 1962).





1 disputed issue of statutory interpretation was "only  
2 for the purpose of illustrating that substantial  
3 questions of statutory determination are presented."  
4 (323 F.2d at 77).

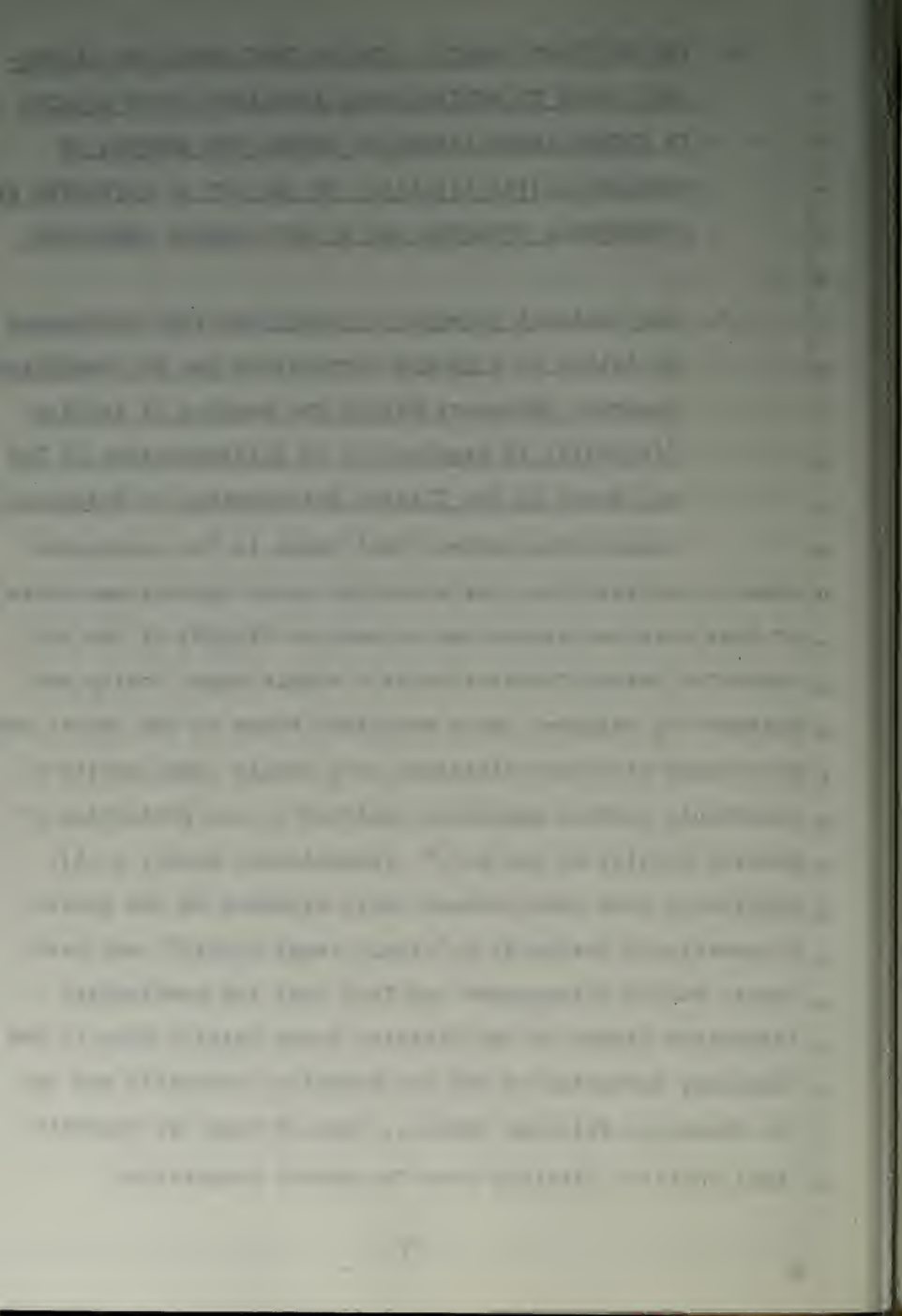
5         Thus, the first question presented in this  
6 case is not, as Appellants urge, "whether the district  
7 court erred in finding and concluding that the news-  
8 paper divisions of The Hearst Corporation were genuinely  
9 neutral employers . . . and . . . that there is  
10 reasonable cause to believe appellants had violated  
11 Section 8(b)(4)(1)(11)(B) of the Act". The question  
12 before this Court is whether the District Court's  
13 finding was clearly erroneous. The District Court was  
14 not required to find that the newspaper divisions of  
15 The Hearst Corporation were genuinely neutral  
16 employers. It found that there was reasonable cause  
17 to believe that they were genuinely neutral employers,  
18 and this finding required no more than the establish-  
19 ment of a substantial factual question concerning  
20 that issue. If the District Court's finding of  
21 reasonable cause, predicated as it must have been  
22 upon a finding of factual and legal issues which are  
23 substantial and not frivolous, was not clearly  
24 erroneous, this Court must affirm.



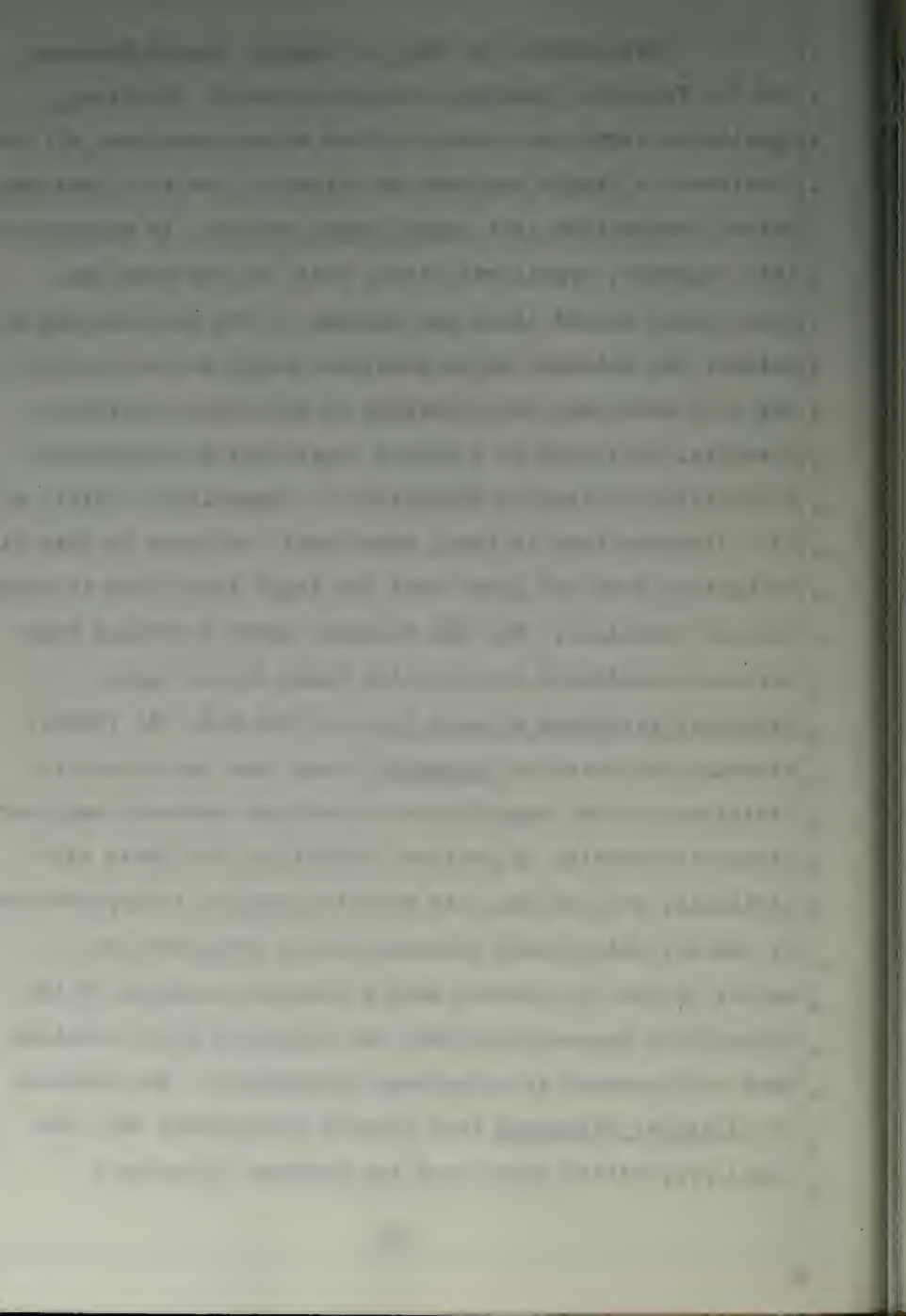
1 II. THE DISTRICT COURT'S FINDING THAT THERE WAS REASON-  
2 ABLE CAUSE TO BELIEVE THAT APPELLANTS HAVE ENGAGED  
3 IN UNFAIR LABOR PRACTICES WITHIN THE MEANING OF  
4 SECTION 8(b)(4)(1)(11)(B) OF THE ACT IS SUPPORTED BY  
5 SUBSTANTIAL EVIDENCE AND IS NOT CLEARLY ERRONEOUS.  
6

7 A. The Regional Director's Contention That Autonomous  
8 Divisions Of A Single Corporation Can Be Considered  
9 Separate Employers Within The Meaning Of Section  
10 8(b)(4)(B) Is Premised On An Interpretation Of The  
11 Act Which Is Not Clearly Unreasonable Or Frivolous.

12 Appellants contend that there is "no reasonable  
13 cause to believe that the picketing under the circumstances  
14 of this case was proscribed by Section 8(b)(4) of the Act,  
15 since The Hearst Corporation is a single legal entity and  
16 neither the National Labor Relations Board or the courts have  
17 ever found different divisions of a single legal entity to  
18 constitute neutral employers entitled to the protection of  
19 Section 8(b)(4) of the Act." (Appellants' Brief, p. 6).  
20 Appellants have thus focused their argument on The Hearst  
21 Corporation's status as a "single legal entity", and have  
22 almost wholly disregarded the fact that the preliminary  
23 injunction issued by the District Court relates also to the  
24 secondary picketing of the San Francisco Chronicle and the  
25 San Francisco Printing Company, both of whom are separate  
26 legal entities distinct from The Hearst Corporation.



1 With respect to the Los Angeles Herald-Examiner,  
2 the San Francisco Examiner, and other Hearst divisions,  
3 Appellants argue that these various enterprises must all be  
4 considered a single employer by virtue of the fact that The  
5 Hearst Corporation is a single legal entity. In support of  
6 this argument, Appellants stress that "in the more than  
7 twenty-year period since the passage of the Taft-Hartley Act,  
8 neither the National Labor Relations Board nor any court  
9 has ever held that the picketing of different divisions,  
10 branches, or stores of a single legal entity constitutes  
11 a violation of Section 8(b)(4)(B)." (Appellants' Brief, p.  
12 8). Although this is true, Appellants' reliance on this bit  
13 of history does not prove that the legal issue here in ques-  
14 tion is frivolous. For the National Labor Relations Board  
15 has only considered this precise issue in one case,  
16 Alexander Warehouse & Sales Co., 128 N.L.R.B. 916 (1960).  
17 Although the Board in Alexander found that the corporate  
18 divisions in that case did not constitute separate employers  
19 within the meaning of Section 8(b)(4)(B), the Board sig-  
20 nificantly did not base its decision upon an interpretation  
21 of the Act which would preclude such a conclusion as a  
22 matter of law. It focused upon a detailed analysis of the  
23 facts which demonstrated that the divisions there involved  
24 were not operated as autonomous enterprises. The decision  
25 in Alexander Warehouse thus clearly establishes that the  
26 legal proposition underlying the Regional Director's

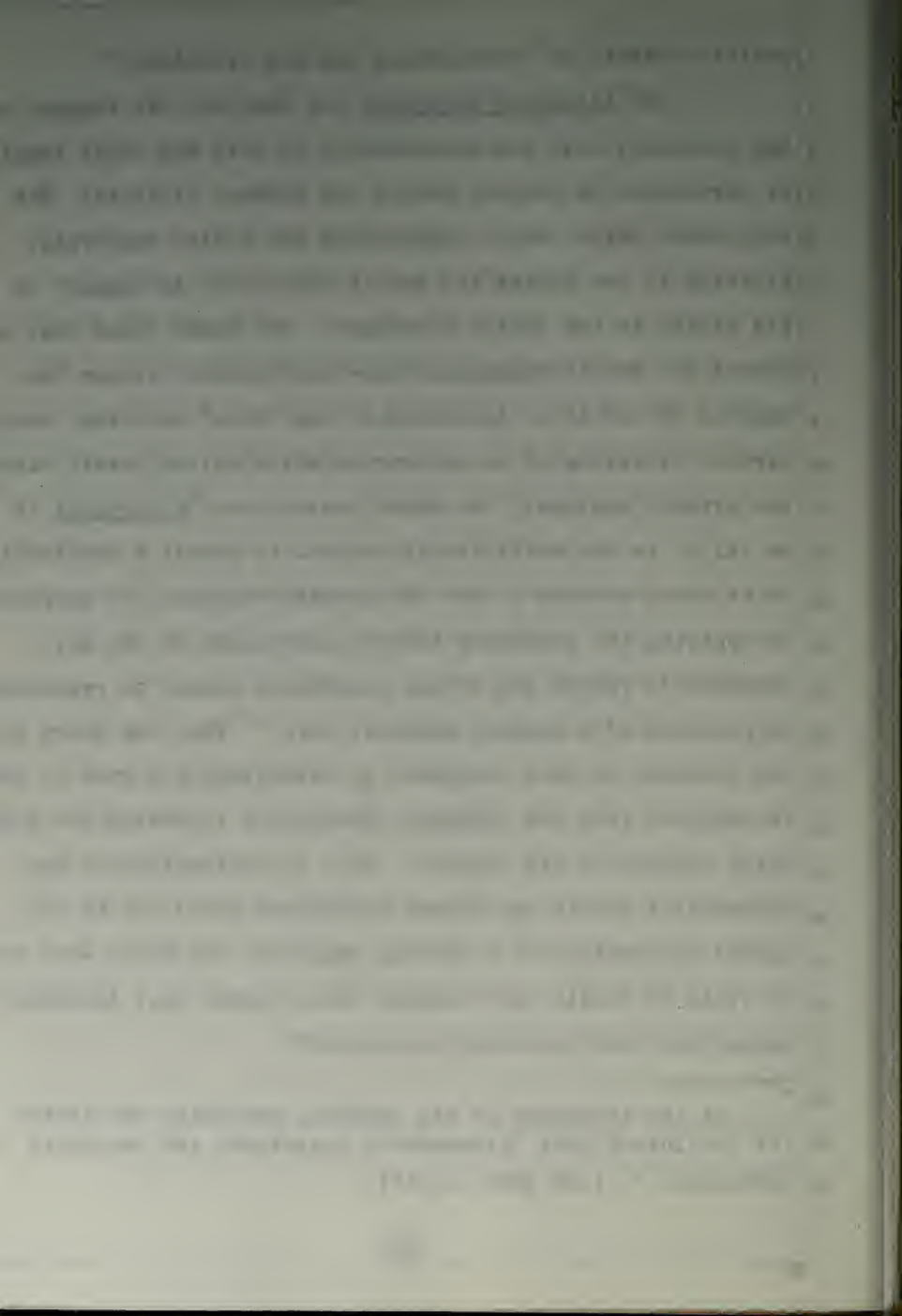




1 petition herein is "substantial and not frivolous."

2 In Alexander Warehouse the employer was engaged in  
3 the purchase, sale and distribution of coal and other supplies  
4 at warehouses in Joliet, Peoria and Urbana, Illinois. The  
5 respondent union, which represented the Joliet employees,  
6 picketed at the Urbana and Peoria warehouses in support of  
7 its strike at the Joliet warehouse. The Board found that the  
8 Urbana and Peoria warehouses were non-neutrals within the  
9 meaning of the Act. Adverting to the "ally" doctrine, which  
10 permits picketing of an enterprise which allies itself with  
11 the primary employer, the Board stated that "a fortiori if  
12 an 'ally' is not sufficiently neutral to permit a distinction  
13 to be drawn between it and the primary employer for purposes  
14 of applying the secondary boycott provisions of the Act,  
15 Alexander's Peoria and Urbana warehouses cannot be regarded  
16 as premises of a neutral employer here." That the Board did  
17 not conceive of this statement as establishing a rule of law  
18 is manifest from the language immediately following the fore-  
19 going excerpt of its opinion. For, in explanation of why  
20 Alexander's Peoria and Urbana warehouses could not be re-  
21 garded as premises of a neutral employer, the Board went on  
22 to state in detail the evidence which showed that Alexander's  
23 operations were centrally controlled\*.

24 \*  
25 At the threshold of its opinion, the Board had stated  
26 its conclusion that "Alexander's operations are centrally  
controlled." (128 NLRB at 916).



1 "Those premises, together with the  
2 Joliet warehouse, are operated under common  
3 general supervision; their purchases are  
4 made by a central purchasing office; they  
5 participate in pool shipments of supplies  
6 in order that Alexander may receive the  
7 benefits of lower freight charges; and  
8 there is some interchange of inventories  
9 between the three warehouses. Thus, the  
10 continued operation of the Peoria and Urbana  
11 warehouses during the Respondents' strike  
12 at the Joliet warehouse constituted, because  
13 of their proximity to, and integration with,  
14 the Joliet warehouse, a factor which conceivably  
15 could have been decisive in determining the  
16 outcome of the dispute, and Respondents could  
17 legitimately extend their picketing to those  
18 premises." (128 NLRB at 919).

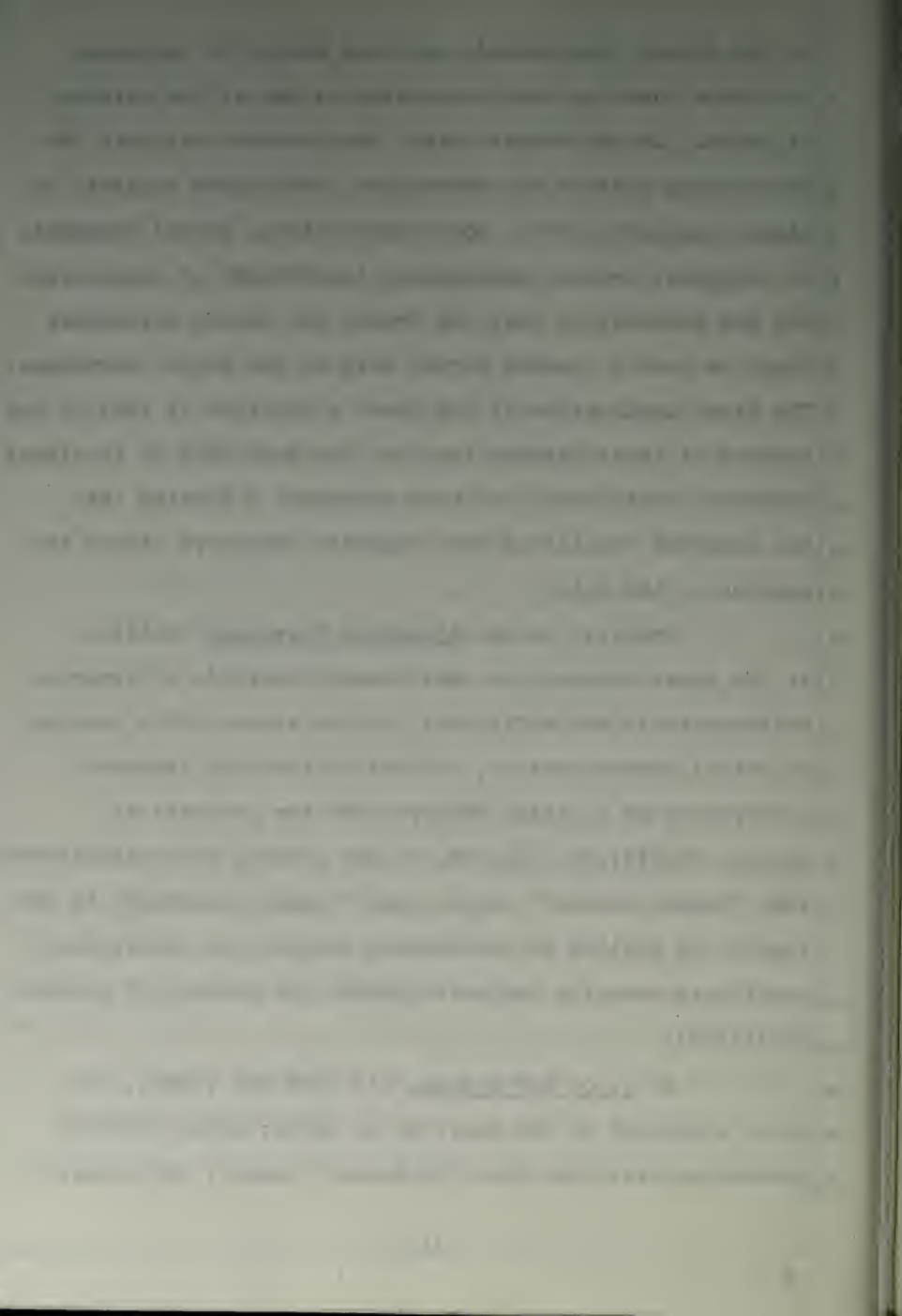
19 Thus, instead of holding that the separate  
20 facilities owned by the same legal entity could not, as a  
21 matter of law, be considered anything but a single employer  
22 within the meaning of the Act, the Board found that the non-  
23 struck warehouses were factually allied with and integrated  
24 with the Joliet warehouse, and therefore, that they were not  
25 neutrals. The finding of such an alliance or potential  
26 alliance was not even based on the single corporate ownership

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1 of the three. Nor, indeed, was this factor of fictional  
2 corporate identity even enumerated as one of the relevant  
3 criteria. In the Board's view, the relevant criteria for  
4 determining whether the warehouses constituted separate or  
5 single employers were: joint supervision, pooled shipments  
6 of supplies, central purchasing, interchange of inventories  
7 and the possibility that the Urbana and Peoria warehouses  
8 might be used to handle struck work of the Joliet warehouse.  
9 The clear implication of the Board's decision is that in the  
10 absence of these various factors, the mere fact of fictional  
11 corporate unity would not have precluded a finding that  
12 the separate facilities were separate employers within the  
13 meaning of the Act.

14         Implicit in the Alexander Warehouse decision  
15 is the legal proposition that common ownership of separate  
16 enterprises is not sufficient, in the absence of a showing  
17 of actual common control, to justify treating separate  
18 enterprises as a single employer for the purposes of  
19 Section 8(b)(4)(B). Indeed, it has clearly been established  
20 that "common control" rather than "common ownership" is the  
21 test to be applied in determining whether two enterprises  
22 constitute separate employers within the meaning of Section  
23 8(b)(4)(B).

24         In J. G. Roy & Sons, 118 NLRB 286 (1957), the  
25 facts presented to the Board in an unfair labor practice  
26 proceeding disclosed that Roy Lumber Company, the primary

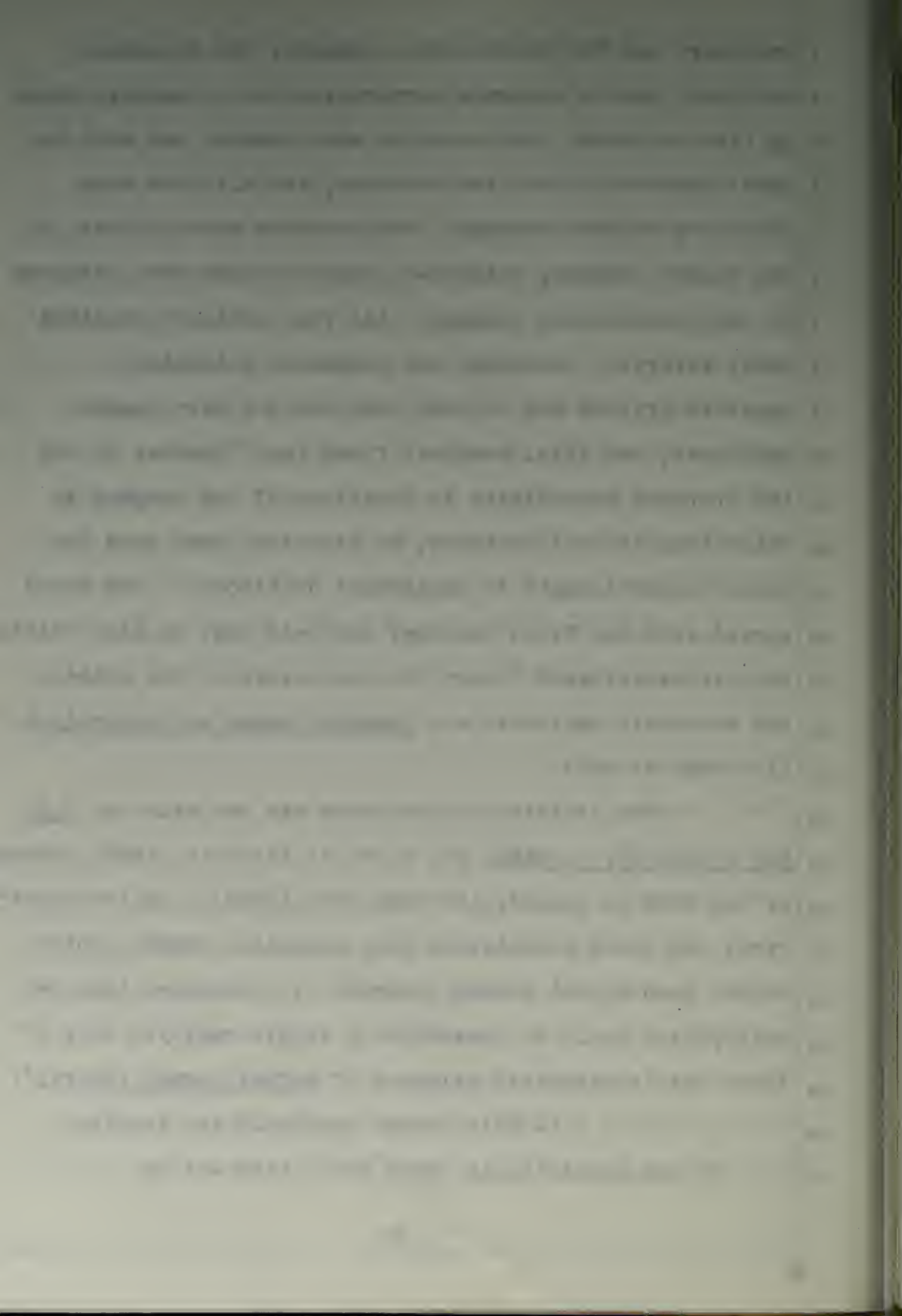




1 employer, and Roy Construction Company, the secondary  
2 employer, each a separate corporation, were commonly owned  
3 by five brothers. The stock of each company was held in  
4 equal amounts by the five brothers, and all five were  
5 directors of each company. Two brothers were officers of  
6 the lumber company, while two other brothers were officers  
7 of the construction company. All four officers received  
8 equal salaries. Although the companies maintained  
9 separate offices and records, and did not have common  
10 employees, the trial examiner found that "whether or not  
11 the brothers participate in decisions of the company in  
12 which they are not officers, as directors they have the  
13 power to participate in management decisions." The Board  
14 agreed with the Trial Examiner and held that an ally relation-  
15 ship is established "where the businesses of the primary  
16 and secondary employers are commonly owned and controlled."  
17 (118 NLRB at 288).

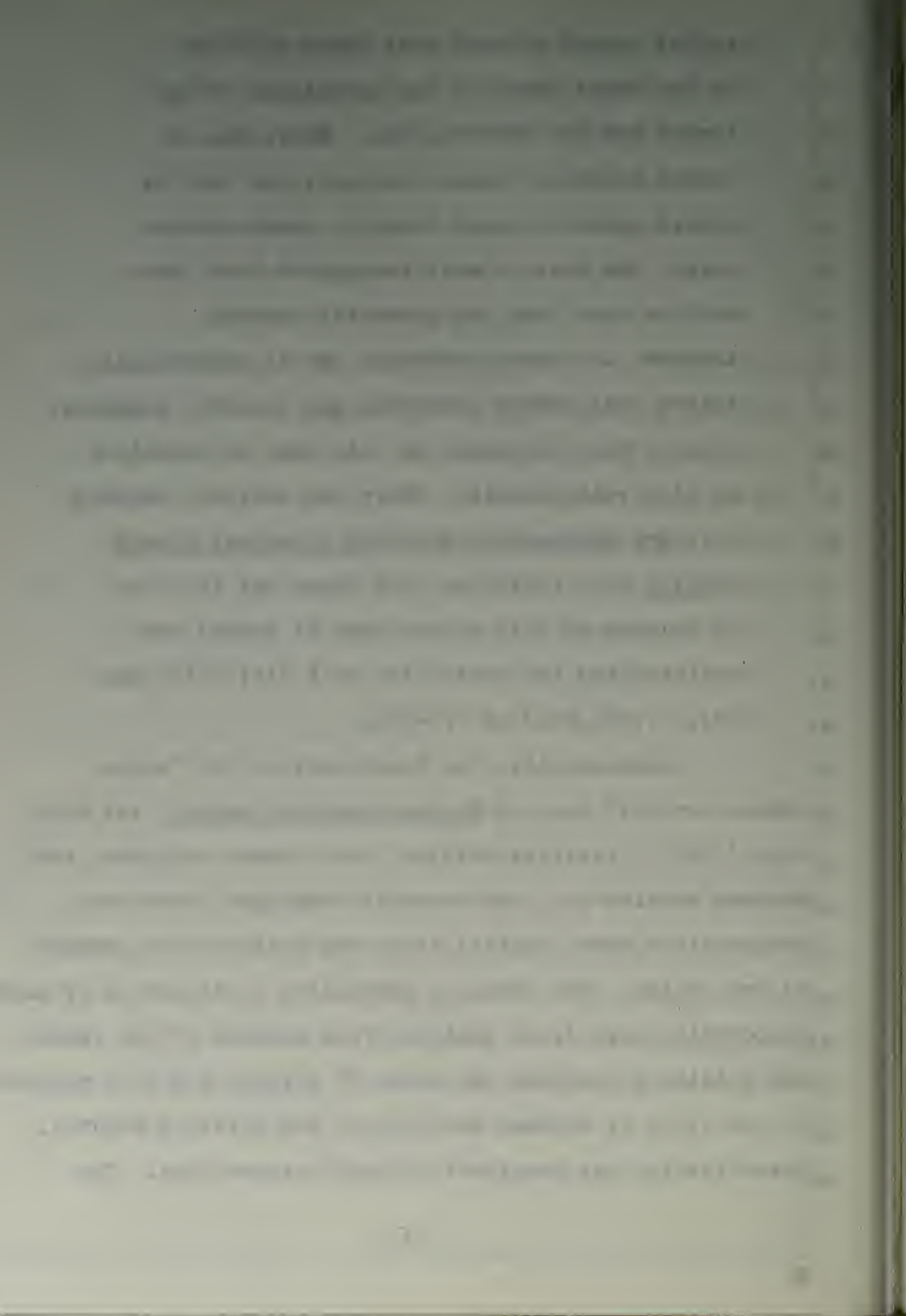
18 The decision of the Board was set aside in J.G.  
19 Roy & Sons Co. v. NLRB, 251 F.2d 771 (1st Cir. 1958), adopted  
20 by the NLRB on remand, 120 NLRB 1016 (1958). In the court's  
21 view, the facts established only potential common control  
22 rather than actual common control. It concluded that two  
23 enterprises could be considered a single employer only if  
24 there was "substantial evidence of actual common control":

25 ". . . [W]hile common ownership was admitted,  
26 it was specifically found that there was no



1 actual common control over labor policies  
2 or any other phase of the operations of Roy  
3 Lumber and Roy Construction. There was of  
4 course potential common control, but this is  
5 always possible where there is common owner-  
6 ship. The Board itself recognized that there  
7 must be more than the potential control  
8 inherent in common ownership for it specifically  
9 stated that common ownership and [court's emphasis]  
10 control were necessary in this case to establish  
11 an ally relationship. There was entirely lacking  
12 here any substantial evidence of actual common  
13 control and, therefore, the Board was in error  
14 in relying on this ground when it denied the  
15 petition and the protection of § 8(b)(4)(A) and  
16 (B)." (251 F.2d at 773-74).

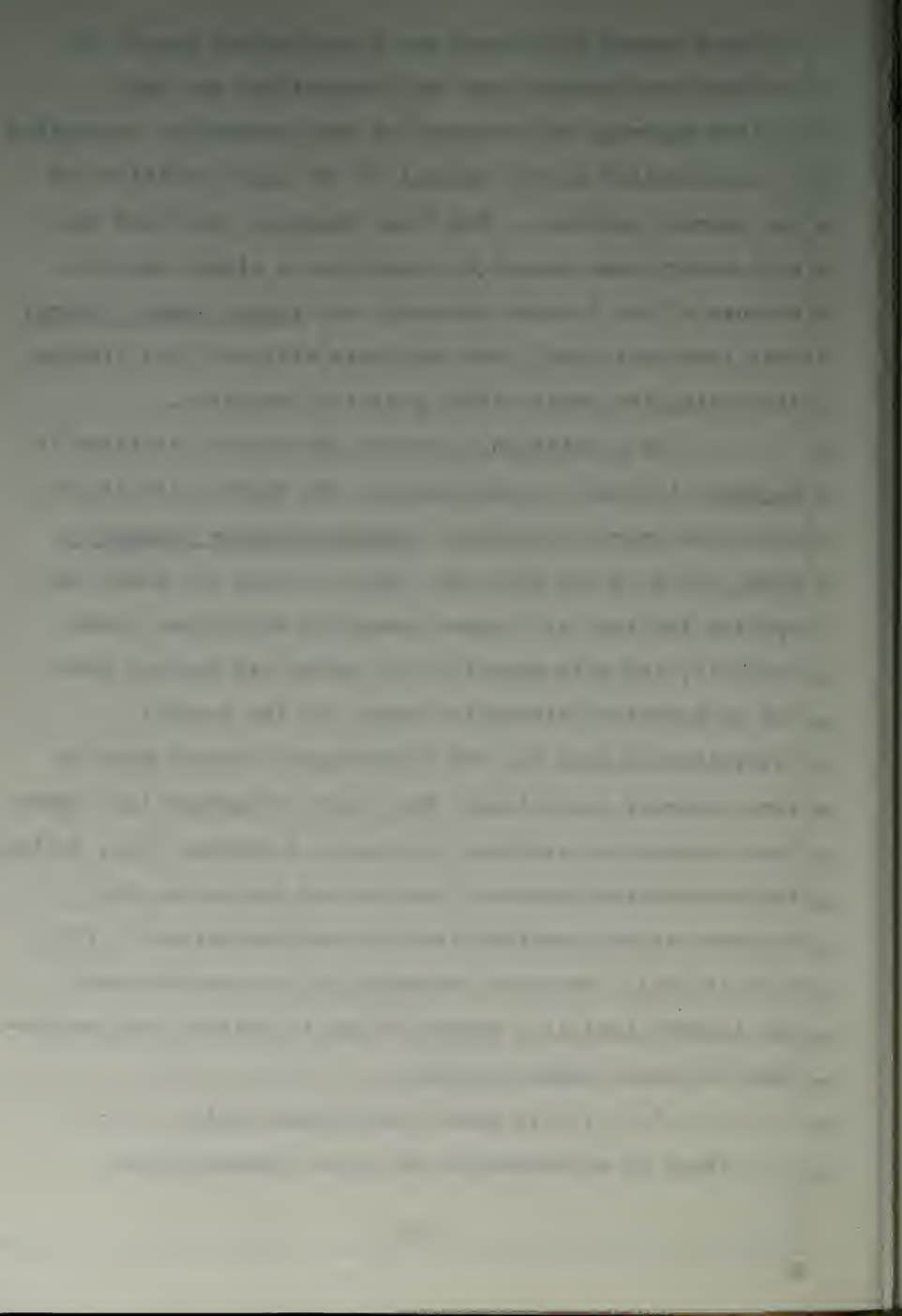
17 Subsequently, the Board applied the "actual  
18 common control" test in Bachman Machine Company, 121 NLRB  
19 1229 (1958). Plastics Molding, the primary employer, and  
20 Bachman Machine Co., the secondary employer, were each  
21 corporations whose capital stock was held by five members  
22 of one family. The officers and boards of directors of each  
23 corporation were drawn entirely from members of the family,  
24 and William N. Bachman who owned 75 percent and 67.5 percent  
25 of the stock of Bachman Machine Co. and Plastics Molding,  
26 respectively, was president of both corporations. The



evidence showed that there was a substantial amount of business done between the two corporations and that William Bachman, as president of both companies, controlled or participated in the control of the labor relations of the primary employer. The Trial Examiner concluded that both enterprises should be considered a single employer because of the "common ownership and actual common control over labor policies", and the Board affirmed this finding, dismissing the unfair labor practice complaint.

On a petition to review the Board's decision in Bachman, the Court of Appeals for the Eighth Circuit set aside the Board's decision. Bachman Machine Company v. NLRB, 266 F.2d 599 (8th Cir. 1959). Since the Board had applied the test of "common ownership and actual common control", the sole question for review was whether there was an adequate evidentiary basis for the Board's determination that the two enterprises involved were in fact commonly controlled. The court recognized that there "was substantial evidence to support a finding that, during the negotiations between Plastics and the union, Mr. Bachman actively participated and made decisions." (266 F.2d at 602). But such evidence, in the court's view, was insufficient as a matter of law to satisfy the requirement of actual common control:

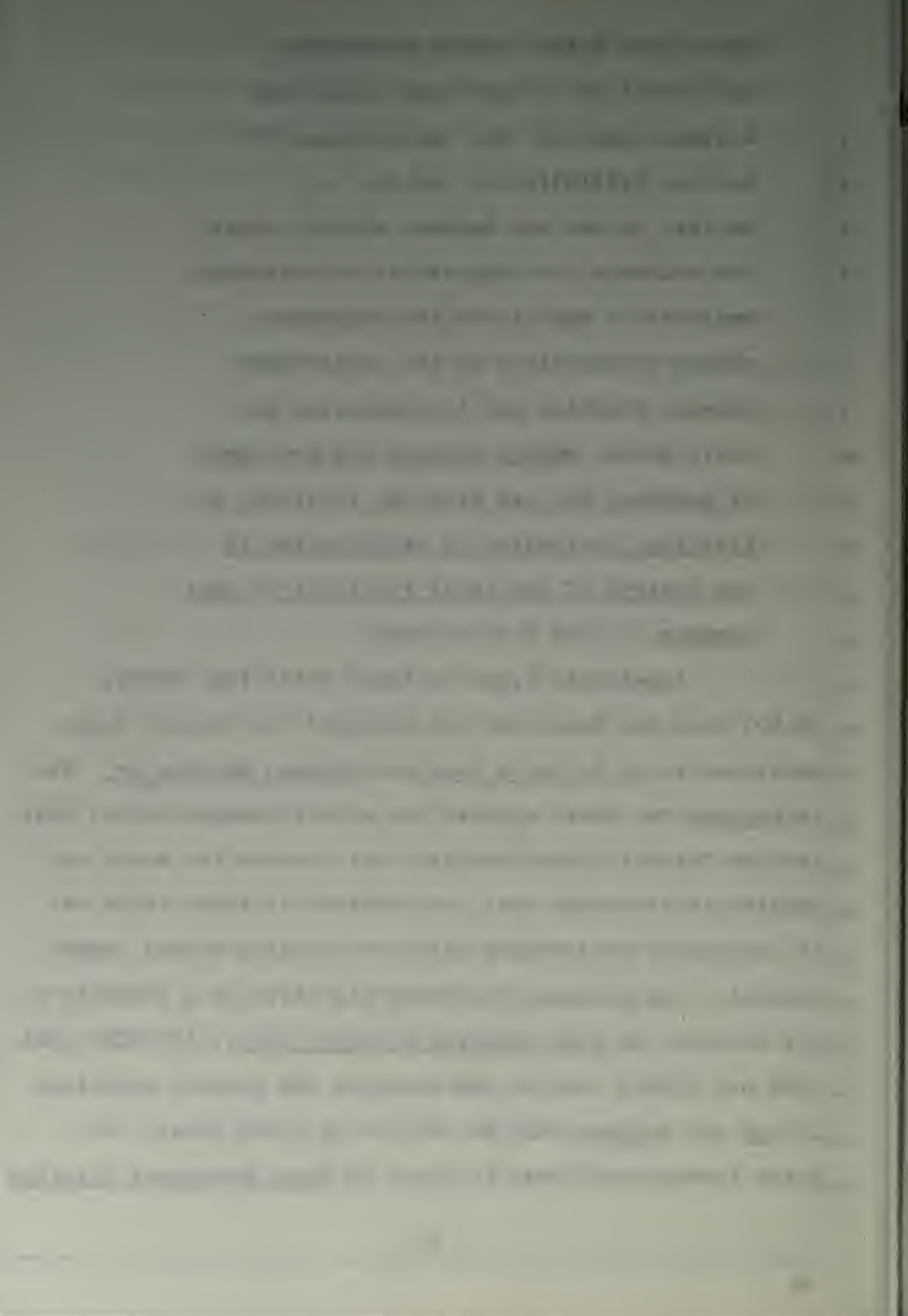
" . . . [W]e think the evidence fell short of establishing that both companies were





1 under such actual common management  
2 or control as to make them allies and  
3 a single employer for the purposes of  
4 Section 8(b)(4)(A) of the Act. . . .  
5 We fail to see why Bachman should, under  
6 the evidence, be regarded as an offending  
7 employer or why it and its employees  
8 should be embroiled in the controversy  
9 between Plastics and its employees and  
10 their Union, merely because the President  
11 of Bachman, who was also the President of  
12 Plastics, controlled or participated in  
13 the control of the labor relations of that  
14 company." (266 F.2d at 605).

15 Appellants argue in their brief (pp. 28029,  
16 39-40) that the Board has not accepted the Circuit Court  
17 decisions in J. G. Roy & Sons and Bachman Machine Co. Yet  
18 in Bachman the Board applied the actual-common-control test,  
19 and the Circuit Court reversed, not because the Board had  
20 applied an erroneous test, but because it found there was  
21 an inadequate evidentiary basis for finding actual common  
22 control. And although the Board did state in a footnote to  
23 its decision in Acme Concrete & Supply Corp., 137 NLRB 1321,  
24 1323 n.2 (1962) that it had accepted the Courts' decisions  
25 in Roy and Bachman only as the law of those cases, the  
26 Board subsequently made it clear in Miami Newspaper Printing



1 Pressmen Local No. 46 (Knight Newspapers, Inc.), 138 NLRB  
2 1346 (1962) that it was adopting the actual-common-control  
3 test formulated in the Roy and Bachman decisions.

4 In Knight Newspapers, the alleged secondary  
5 employer was Knight Newspapers, Inc., an Ohio corporation,  
6 which published the Detroit Free Press. The alleged primary  
7 employer was the Miami Herald Publishing Company, a  
8 corporation which was wholly owned by Knight Newspapers.  
9 All of the stock of Knight Newspapers was owned by three  
10 members of the Knight family, James, John and Clara Knight.  
11 James Knight was general manager of the Miami Herald. John  
12 Knight was president and a director of both corporations,  
13 and Clara and James Knight served on both boards of directors.  
14 In a Section 10(1) proceeding the district court applied the  
15 actual-common-control test and issued an injunction premised  
16 on the finding that there was reasonable cause to believe  
17 that the Detroit Free Press and the Miami Herald were  
18 separate employers, notwithstanding their common ownership.  
19 Roumell v. Miami Newspaper Printing Pressmen, 198 F.Supp.  
20 851 (E.D.Mich. 1961).

21 In the subsequent Board case, Miami Printing  
22 Pressmen's Local No. 46 (Knight Newspapers, Inc.), 138 NLRB  
23 1346 (1962), the Board affirmed the Trial Examiner's  
24 findings that the union had violated Sections 8(b)(4)(1)  
25 (11)(B) by picketing Knight Newspapers, Inc. at the Detroit  
26 Free Press in support of its economic strike against the



1 Miami Herald:

2 "The record shows the Detroit Free  
3 Press is owned and published by Knight  
4 Newspapers, Inc., which is also the parent  
5 of the corporation owning and publishing  
6 the Miami Herald; that, notwithstanding  
7 the fact of single ownership, and the  
8 existence of some common officers and  
9 directors of the two corporations, they  
10 are operated in substance as separate and  
11 autonomous corporations, publishing news-  
12 papers in communities 800 miles apart. . . .

13 ". . . [The evidence is] insufficient  
14 to establish that the Detroit Free Press and  
15 the Miami Herald are operated as a single  
16 integrated business operation. . . .

17 [N]otwithstanding the closely held nature  
18 of the two corporations and the potentiality  
19 of integrated operations under common control  
20 that does exist, the Detroit Free Press and  
21 the Miami Herald are operated independently  
22 of each other, as separate autonomous news-  
23 paper enterprises." (138 NLRB 1347-48).

24 Sifnificantly, in the Trial Examiner's report  
25 which was adopted by the Board, the Trial Examiner cited  
26 the Circuit Court decisions in Roy and Bachman as establishing





1 the actual-common-control test, and commented that in  
2 Amalgamated Lithographers of America, 130 NLRB 985 (1961)  
3 "the Board unambiguously indicated that it acquiesced in the  
4 principal enunciated by the circuit courts of appeals in"  
5 the Roy and Bachman cases. (138 NLRB at 1352).

6 Were there any doubt about the validity of the  
7 actual-common-control test, it was laid to rest when the  
8 Court of Appelas for the District of Columbia enforced the  
9 Board's order in Miami Newspaper Pressmen's Local v. NLRB,  
10 322 F.2d 405 (D.C.Cir. 1963). Citing with approval the  
11 Circuit Court decisions in Roy and Bachman, the court stated  
12 that "both the Board and the courts have consistently and  
13 repeatedly held that common ownership alone does not suffice"  
14 for establishing that two enterprises are a single employer  
15 within the meaning of the Act. (322 F.2d at 408). The  
16 court further stated:

17 "There must be . . . an actual . . .  
18 integration of operations and management  
19 policies. Two business enterprises,  
20 although commonly owned, do not for that  
21 reason alone become so allied with each  
22 other as to lift the congressional ban upon  
23 the extension of labor strife from the one  
24 to the other.

25 "Although the Union argues that  
26 common ownership alone is sufficient to

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1 justify its bringing the Free Press  
2 within the orbit of its legitimate strike  
3 pressure, it does not - as it cannot -  
4 rest, in the last analysis, on this  
5 claim." (322 F.2d at 409).

6 Of equal significance for this case was the stress  
7 placed by the court upon the many factors which necessarily  
8 contribute to the independent nature of newspaper  
9 organizations operated in different cities:

10 "These two metropolitan daily newspapers  
11 appear to have had separate and largely un-  
12 related lives of their own, despite their  
13 common ownership. Published hundreds of  
14 miles apart in two distinctive urban  
15 communities of the United States, each  
16 paper went its way under independent direction  
17 supplied locally, as they must have done in  
18 order to be successfully responsive to the  
19 varying needs of their two unrelated  
20 readerships. A newspaper reflects in  
21 significant measure the peculiar personality  
22 of its locale. To the extent that it does  
23 so in fact, its commercial success is to  
24 that degree correspondingly assured. Wise  
25 publishers know this to be true and shape  
26 their arrangements and policies accordingly.



1 This appears to be the case here."

2 (322 F.2d at 409).

3 More recently, the Board applied the actual-  
4 common-control test in Drivers, Chauffeurs and Helpers  
5 Local No. 639 (Poole's Warehousing, Inc.), 158 NLRB 1281  
6 (1966). In this case the alleged primary employer was  
7 Poole's Drayage Co., a partnership between Charles W.  
8 Poole and his brother Brereton Poole. Drayage was engaged  
9 in the business of trucking perishable commodities. The  
10 alleged secondary employer, located two miles from Drayage,  
11 was Poole's Warehousing, Inc., which was engaged in the  
12 business of storing grocery commodities for producers.  
13 The Poole brothers were the sole shareholders and were  
14 president and vice president of Warehousing. Although  
15 Charles Poole was the general manager of Drayage, its  
16 day-to-day operations and labor problems were supervised by  
17 a traffic manager, Mr. Stevens. The warehousing operations  
18 were run by Edward Hampl, as manager. Although Warehousing  
19 maintained separate account books, a separate bank account,  
20 and separate accounts receivable, it shared the same general  
21 office with Drayage. In addition Warehousing and Drayage  
22 employed a common bookkeeper who worked in the general  
23 office on the premises of Drayage. Approximately 7 percent  
24 of Drayage's gross receipts were from hauling items stored  
25 at Warehousing.

26 On the foregoing facts, the Trial Examiner found

IN WHICH ARE CONTAINED THE PARTICULARS OF HIS LIFE AND DEATH

BY SAMUEL JOHNSON, ESQ. OF LONDON

IN TWO VOLUMES. THE SECOND.

LONDON: Printed by J. KNEELAND, at the Golden-Anchor in St. Dunstons Church-yard, 1719.

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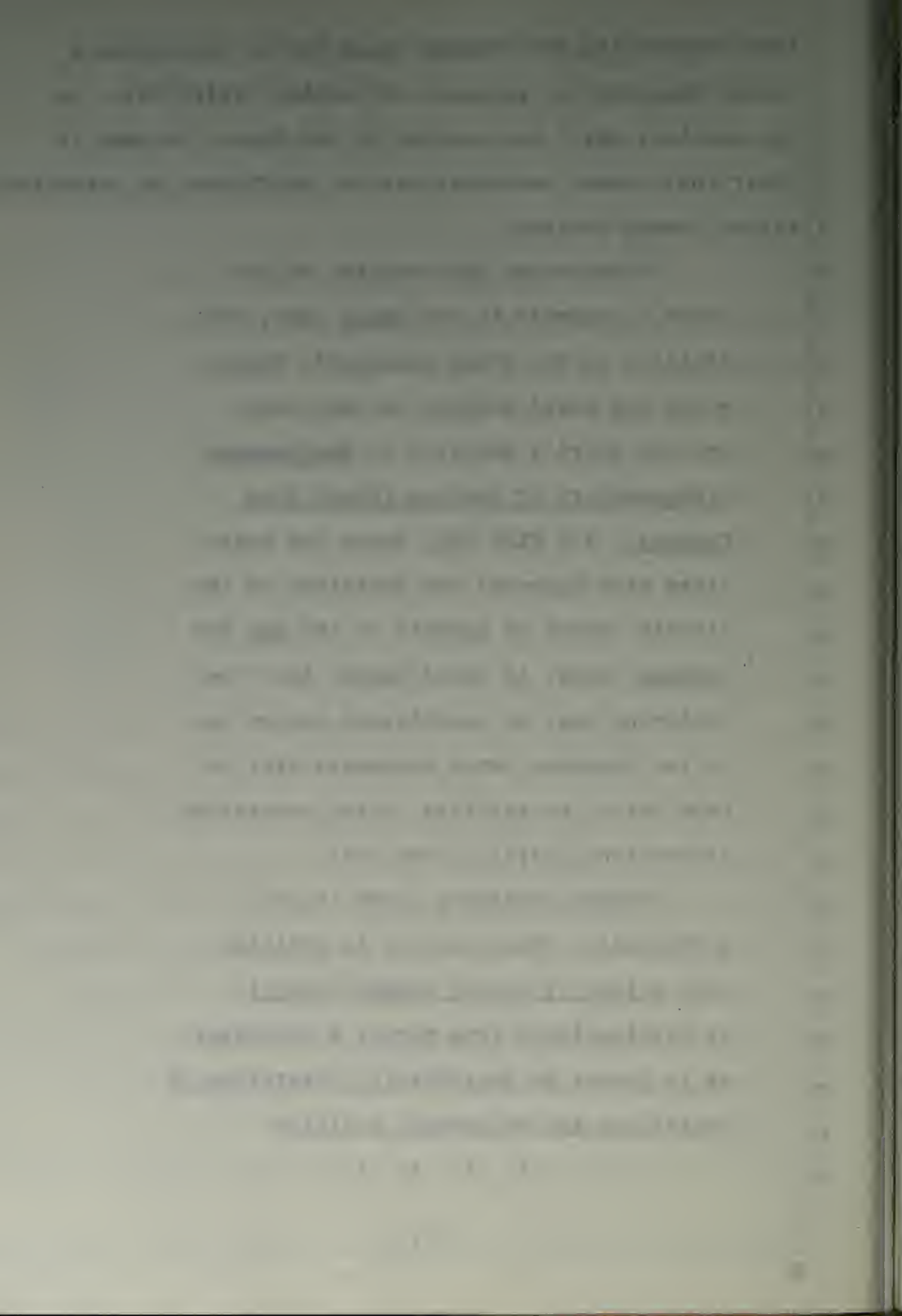


1 that Warehousing and Drayage could not be considered a  
2 single employer for purposes of Section 8(b)(4)(B). In  
3 his opinion, which was adopted by the Board, he made it  
4 clear that common ownership was not sufficient to establish  
5 active common control:

6 "Considering the decision of the  
7 court of appeals in the Miami case, the  
8 decision in the Trial Examiner's Report  
9 which the Board adopted in that case,  
10 and the Board's decision in Amalgamated  
11 Lithographers of America (Miami Post  
12 Company), 130 NLRB 968, where the Board  
13 cited with approval the decisions of the  
14 circuit courts of appeals in the Roy and  
15 Bachman cases, it would appear that the  
16 following must be established before one  
17 of two commonly owned companies will be  
18 held not to be entitled to the protection  
19 of Section 8(b)(4) of the Act:

20 "Common ownership alone is not  
21 sufficient. There must be in addition  
22 such actual or active common control,  
23 as distinguished from merely a potential,  
24 as to denote an appreciable integration of  
25 operations and management policies.

26 \* \* \* \*



1           ". . . While potential control over  
2     Warehousing may reside in the Poole brothers,  
3     the actual or active control of the day-to-day  
4     operations is in the hands of Manager Hampl.

5     . . ." (158 NLRB at 1286).

6           There can thus be no doubt that the actual-common-  
7     control test is accepted by the Board and the courts.  
8     Indeed, in the most recent Section 10(1) proceeding involv-  
9     ing this issue, the district court granted an injunction  
10    premised upon that rule, stating that "common ownership  
11    alone does not suffice to demand that separate entities be  
12    treated as one." Hoban v. Local 559, Int'l. Bhd. of Team-  
13    sters, 55 CCH Lab.Cas.Par. 12007 (D.Conn. 1967).

14           Appellants contend that the actual-common-  
15    control test adopted by the above line of authorities is  
16    applicable only where there are distinct and separate legal  
17    entities and not when the enterprises involved are un-  
18    incorporated divisions of the same corporation. In  
19    Appellants' view, the rule "was adopted for the purpose of  
20    preventing employers from limiting the basic right of  
21    unions to picket by adopting the subterfuge of separate  
22    corporate entities," and application of the common control  
23    test to separate divisions of a single corporation would  
24    "distort and reverse that rule to achieve a result which  
25    is the precise opposite of its purpose and effect."  
26    (Appellants' Brief, p. 24). But this argument finds no

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1 support in the above discussed cases. For there is no  
2 language in any of those cases which even remotely suggests  
3 that the courts or the Board conceived of the rule as a  
4 device for preventing "subterfuge" by employers. Indeed, the  
5 rule was conceived in Roy and Bachman, and invoked in Knigh  
6 Newspapers and Poole's Warehousing, not to prevent subterfuge  
7 by employers but to extend to independent enterprises, even  
8 though commonly owned, the protection of Section 8(b)(4)'s  
9 ban on secondary boycotts. The principle underlying the  
10 rule is even-handed. It protects enterprises that are  
11 operated independently of the primary business; and it  
12 protects the union's right to picket a business which is not  
13 genuinely independent from the primary employer.

14 Not a single one of the above-discussed cases  
15 predicates the application of the actual-common-control  
16 rule on the presence or significance of one or more  
17 corporate personalities. The common denominator of the  
18 cases is that they look through form to substance. And,  
19 this rationale is equally applicable whether a labor  
20 dispute involves one fictional corporate personality or two.  
21 In either case, the rule commands the court to look to the  
22 economic realities of intercorporate or intracorporate  
23 relationships. This is manifestly evident from the manner  
24 in which the Board reached its decision in Alexander  
25 Warehouse. For as we have seen, in that case the Board did  
26 not rest its decision on the touchstone of corporate





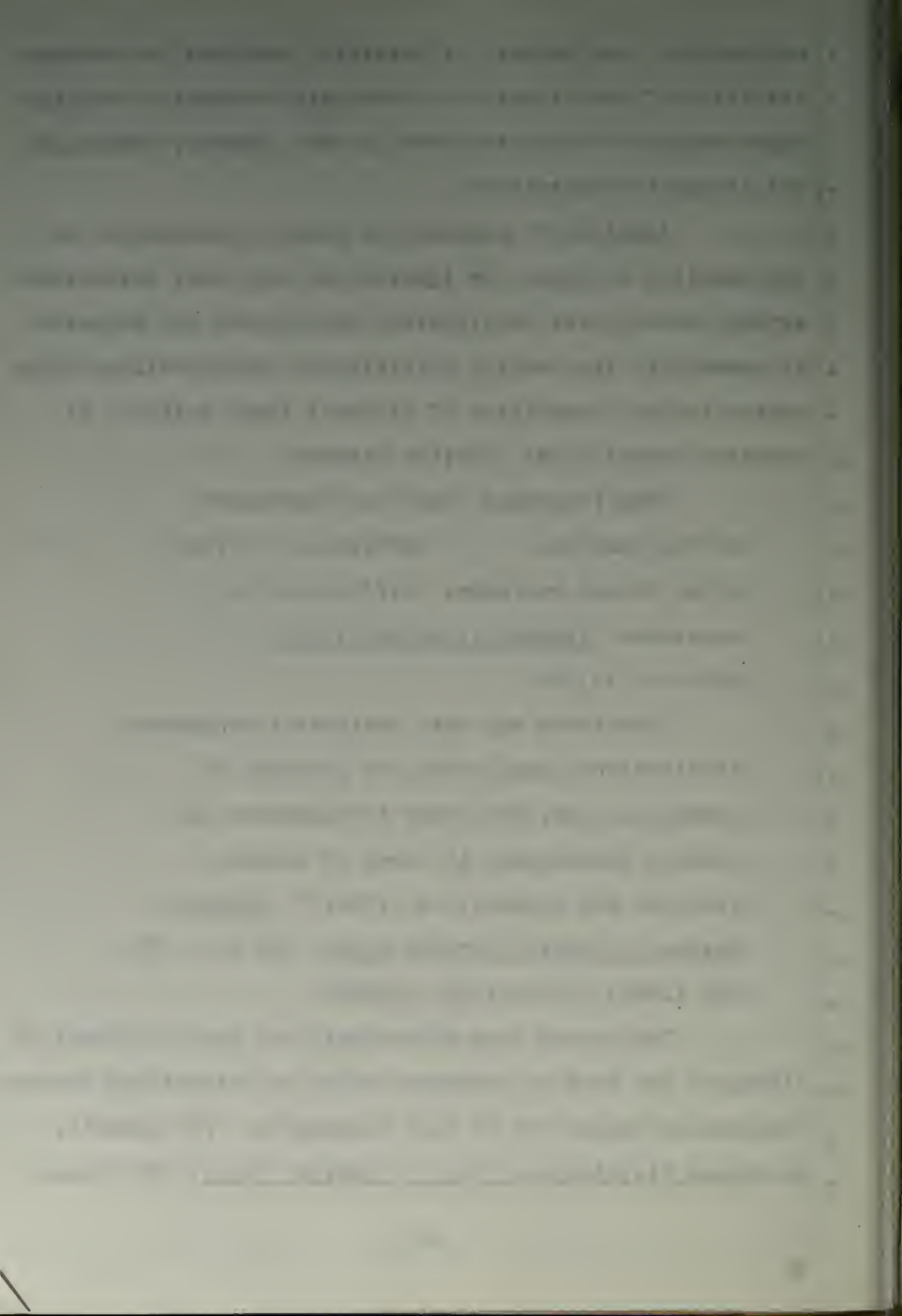
1 personality, but rather, it carefully analyzed the economic  
2 realities of the situation to determine whether or not the  
3 three separate warehouses were in fact commonly controlled  
4 and integrated operations.

5 Appellants' argument is thus an incantation to  
6 the sanctity of form. It ignores the fact that businessmen  
7 arrange enterprises in different legal modes for purposes  
8 of commercial law, wholly unrelated to considerations which  
9 obtain in the formulation of national labor policy. As  
10 recently stated by Mr. Justice Stewart:

11 "The [Supreme] Court has emphasized  
12 in the past that . . . differences in form  
13 often do not represent 'differences in  
14 substance' Simpson v. Union Oil Co.,  
15 377 U.S. 13, 22.

16 "Draftsmen may cast business arrangements  
17 in different legal modes for purposes of  
18 commercial law, but these arrangements may  
19 operate identically in terms of economic  
20 function and competitive effect." (United  
21 States v. Arnold, Schwinn & Co., 388 U.S. 365,  
22 393 (1967) (concurring opinion).

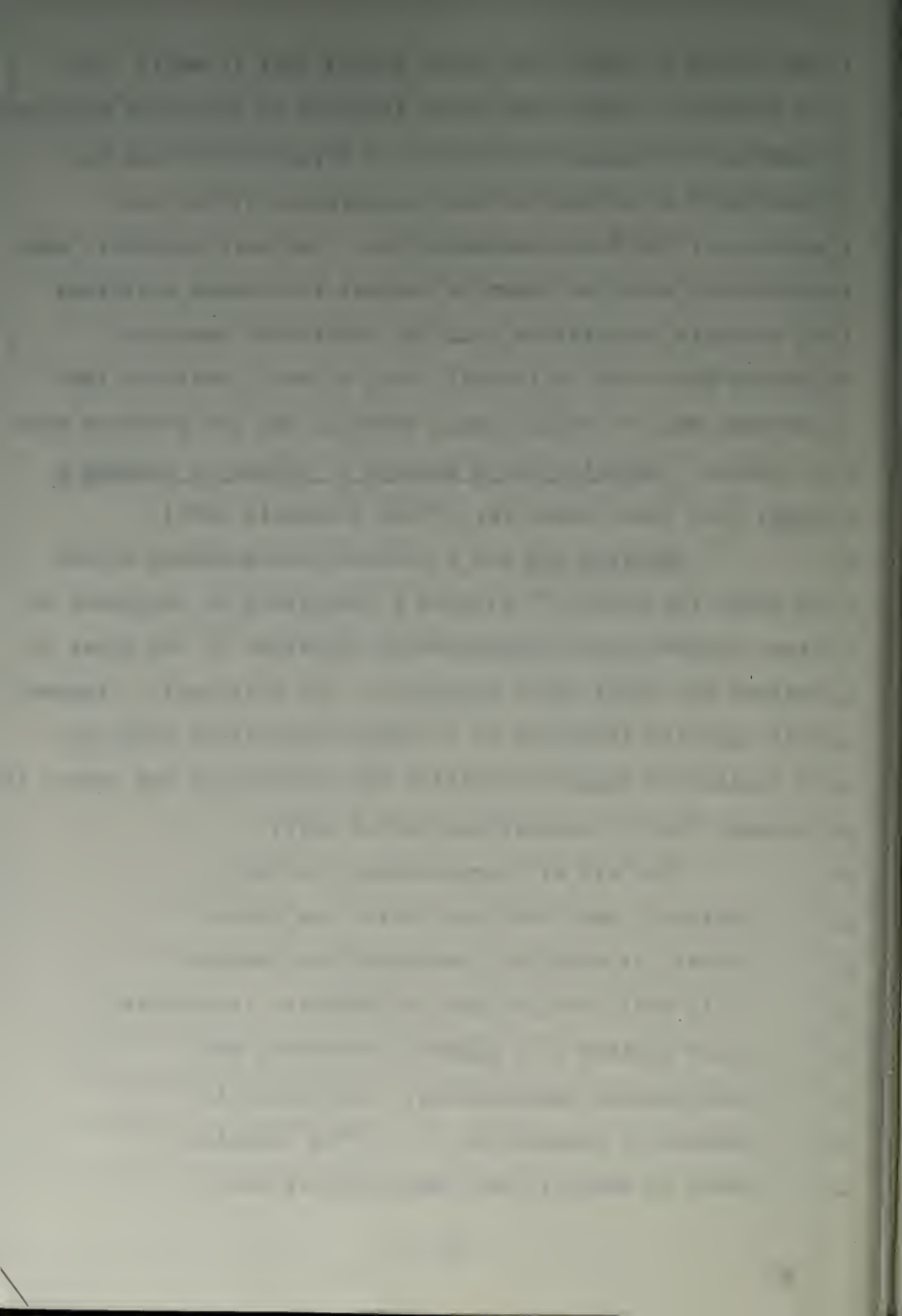
23 The courts have accordingly not been reluctant to  
24 disregard the form of corporate unity in determining whether  
25 separate divisions are in fact autonomous. For example,  
26 in Reines Distributors, Inc. v. Admiral Corp., 256 F.Supp.



1 581 (S.D.N.Y. 1966), the court stated that it would "look  
2 to substance rather than form" in order to determine whether a  
3 seemingly autonomous division of a corporation could be  
4 considered a customer of that corporation within the  
5 meaning of the Robinson-Patman Act. And more recently, when  
6 confronted with the issue of whether autonomous divisions  
7 of a single corporation could be considered separate  
8 persons under the anti-trust laws, a court concluded that  
9 the mere fact of single legal identity did not preclude such  
10 a finding. Hawaiian Oke & Liquors v. Joseph E. Seagram &  
11 Sons, 1967 Trade Cases Par. 72186 (D.Hawaii 1967).

12 Hawaiian Oke was a private treble-damage action  
13 in which the plaintiff alleged a conspiracy in restraint of  
14 trade between four unincorporated divisions of the House of  
15 Seagram and three other companies. The defendants' argument  
16 that separate divisions of a single corporation could not  
17 be considered separate entities was rejected by the court, in  
18 language that is equally applicable here:

19 "But are all corporations, in fact,  
20 'persons' each with one brain, one nerve  
21 center, at which all decisions are reached?  
22 It is well settled that in corporate structures  
23 which consist of a parent corporation and  
24 incorporated subsidiaries, each entity is  
25 capable of conspiring. . . . The question,  
26 then, is what, if any, magic occurs when



1 the paper partition is removed. Is a  
2 business group which chooses to organize  
3 as a single corporation with unincorporated  
4 divisions automatically cast in the form  
5 of a normal person? Or may we have a  
6 corporate 'person' in the form of a multi-  
7 headed Siva, or as portrayed by Dali or  
8 Artzybasheff?

9 "Thus, whether a division is capable  
10 of conspiring depends on the particular  
11 facts demonstrated. Is each facet of the  
12 unincorporated division's operation in fact,  
13 for all purposes, controlled and directed  
14 from above, or is it endowed with separable,  
15 self-generated and moving power to act in  
16 the pertinent area of economic activity?  
17 This is the key question. If the division  
18 operates independently in directing the  
19 relevant business activity, then it is a  
20 separate business entity under the anti-  
21 trust laws. There is nothing sacrosanct  
22 about the 'unincorporated' aspect of corporate  
23 divisions." (pp. 84261-62).

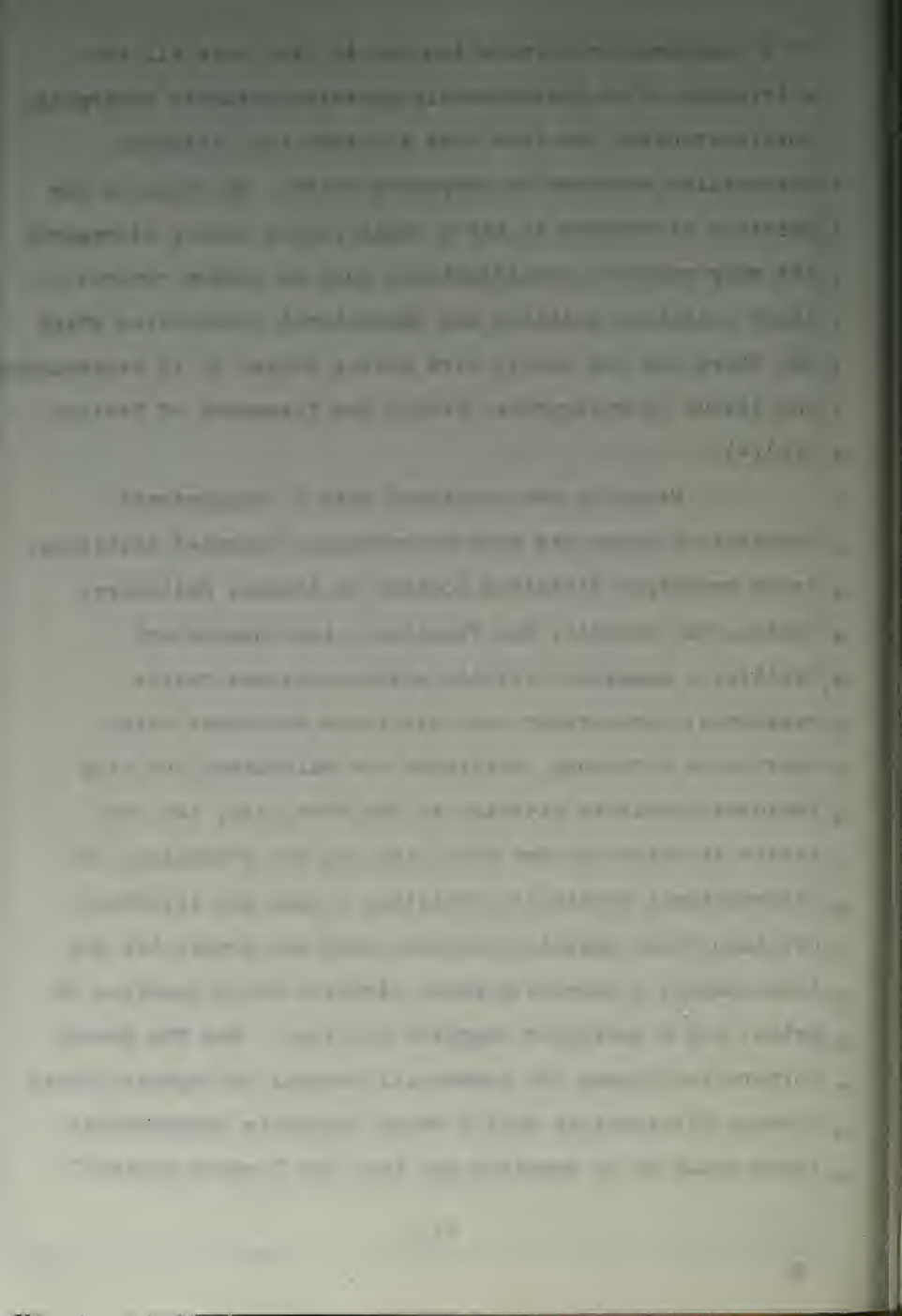
24 Likewise in the field of labor relations, there is  
25 no reason to elevate the concept of corporate personality  
26 to the status of sacred dogma. An autonomous division of





1 of a conglomerate corporation may in fact have all the  
2 attributes of an independently operated business enterprise  
3 notwithstanding the fact that it lacks the fictional  
4 personality accorded by corporate birth. To focus on the  
5 question of whether it has a legal psyche wholly disregards  
6 the many relevant considerations such as common control of  
7 labor relations policies and operational integration which  
8 the Board and the courts have always looked to in determining  
9 the status of enterprises within the framework of Section  
10 8(b)(4).

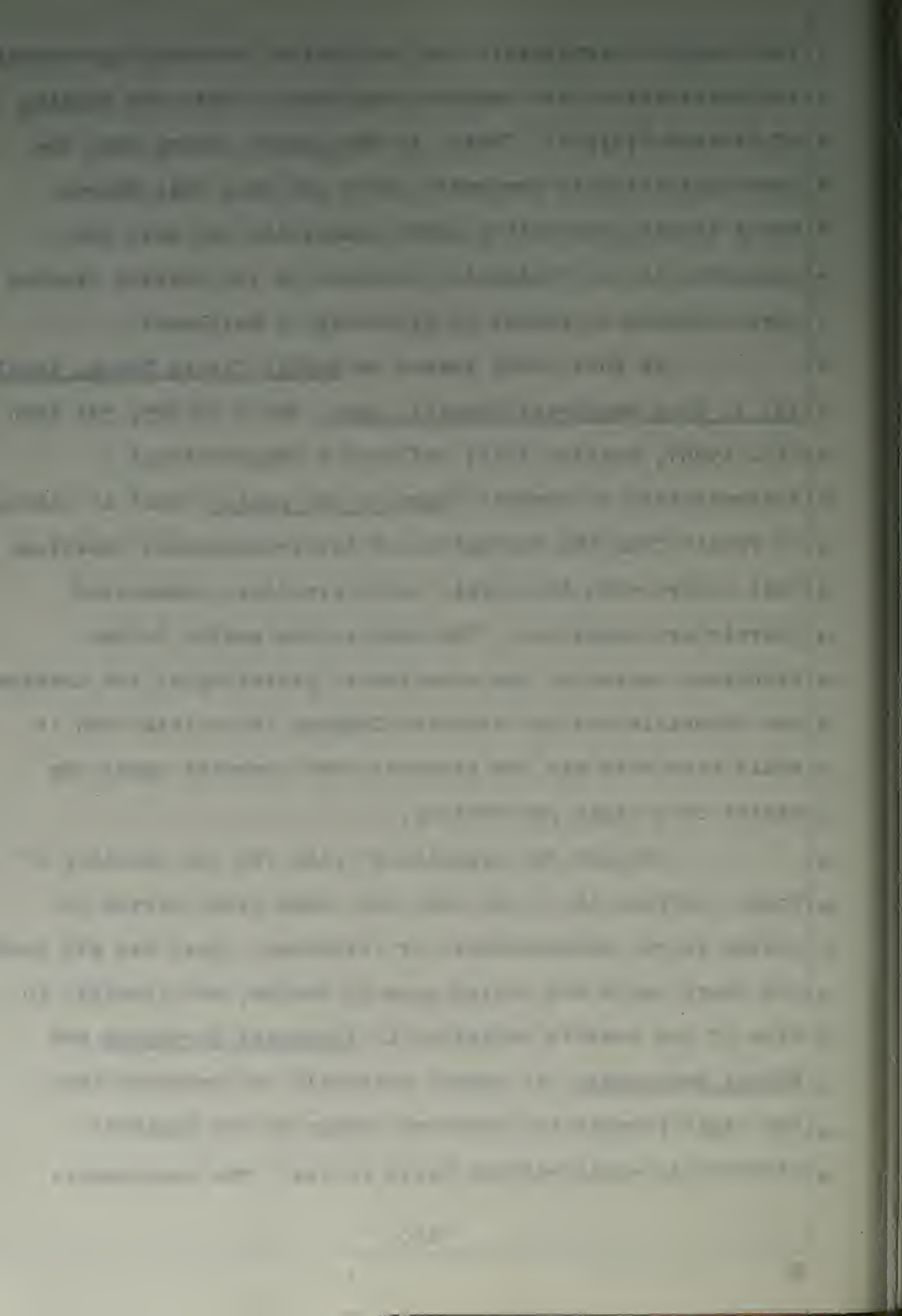
11 Here, we are concerned with a conglomerate  
12 corporation which has many autonomously operated divisions:  
13 seven newspaper divisions located in Albany, Baltimore,  
14 Boston, San Antonio, San Francisco, Los Angeles and  
15 Seattle; a magazine division which publishes twelve  
16 magazines; three radio and television divisions which  
17 operate in Pittsburg, Baltimore and Milwaukee; the King  
18 Features Syndicate division in New York City; two real  
19 estate divisions in New York City and San Francisco; an  
20 International Studio Art Division; a land and livestock  
21 division which operates western ranch and properties and  
22 timberlands; a specialty paper division which operates in  
23 Maine; and a newspaper supplies division. Had The Hearst  
24 Corporation chosen for commercial reasons to organize these  
25 diverse divisions as wholly owned corporate subsidiaries,  
26 there would be no question but that the "common control"



1 test would be applicable for purposes of determining whether  
2 the enterprises were separate employers within the meaning  
3 of Section 8(b)(4). "What, if any, magic occurs when the  
4 paper partition is removed?" Does the fact that Hearst  
5 has a single personality under commercial law give the  
6 employees in its Studio Art Division or its western ranches  
7 carte blanche to picket in Pittsburg or Baltimore?

8 As this court stated in Retail Clerks Union, Local  
9 137 v. Food Employers Council, Inc., 351 F.2d 525, 531 (9th  
10 Cir. 1965), Section 10(1) reflects a Congressional  
11 determination to prevent "harm to the public" that is likely  
12 to result from the disruption of labor-management relations  
13 that occurs when the unfair labor practices enumerated  
14 therein are committed. The harm to the public in San  
15 Francisco caused by the Appellants' picketing of the Examiner,  
16 the Chronicle and the Printing Company is no less than it  
17 would have been had the Examiner been operated under the  
18 mantle of a legal personality.

19 So much for Appellants' plea for the sanctity of  
20 form. Suffice it to say that the legal issue herein in-  
21 volved is not insubstantial or frivolous. That was all that  
22 the Court below was called upon to decide, and clearly, in  
23 view of the Board's decisions in Alexander Warehouse and  
24 Knight Newspapers, it cannot seriously be contended that  
25 the legal proposition advanced herein by the Regional  
26 Director is wholly without basis in law. The respondents



1 in Knight Newspapers also challenged the common-control  
2 rule as being wholly without merit in the context of  
3 commonly owned newspapers, but the district court rejected  
4 their argument in language that is particularly applicable  
5 here:

6 "The difficulties involved in reading  
7 coherent interpretations of our labor law  
8 are manifest. They ought not to be compounded  
9 by requiring the settling of these questions  
10 in the context of a hastily called injunction  
11 proceeding.

12 "The rule of law relied upon by the  
13 petitioner may be questioned, but, as it  
14 certainly cannot be characterized as un-  
15 substantial or 'frivolous', it is not for  
16 me at this time to pass upon its correctness."

17 \* \* \*

18 "Respondent cogently argues that the  
19 sole owner of the primary employer can hardly  
20 be considered 'neutral'. This is especially  
21 true where, as here, the owner is not a  
22 mere financial holding company but rather  
23 owns the primary employer as part of a chain  
24 of similar (newspaper publishing) corporations.

25 "Nevertheless, as the petitioner's view  
26 of this unsettled corner of the law is certainly

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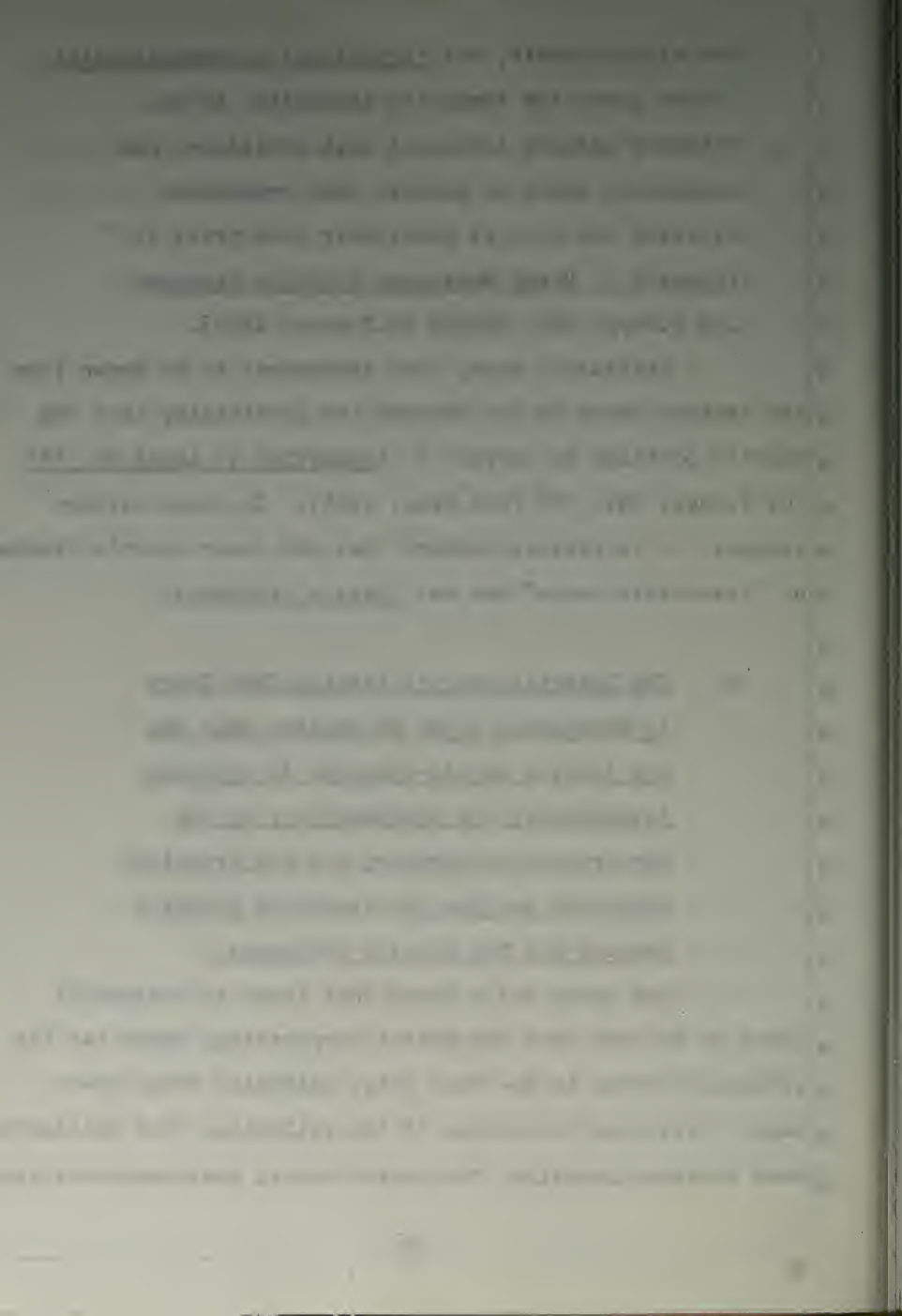


not without merit, nor 'frivolous' or unsubstantial,  
I must grant the temporary injunction if the  
evidence adduced indicates that petitioner has  
reasonable cause to believe that respondent  
violated the Act, as petitioner interprets it."  
(Roumell v. Miami Newspaper Printing Pressmen,  
198 F.Supp. 851, 853-54 (E.D.Mich. 1961).

Similarly, here, "the inferences to be drawn from  
the decided cases do not exclude the possibility that the  
Board's position is correct." Schauffler v. Local No. 677  
201 F.Supp. 637, 638 (E.D.Penn. 1961). In these circum-  
stances, it is plainly evident that the lower court's finding  
of "reasonable cause" was not clearly erroneous.

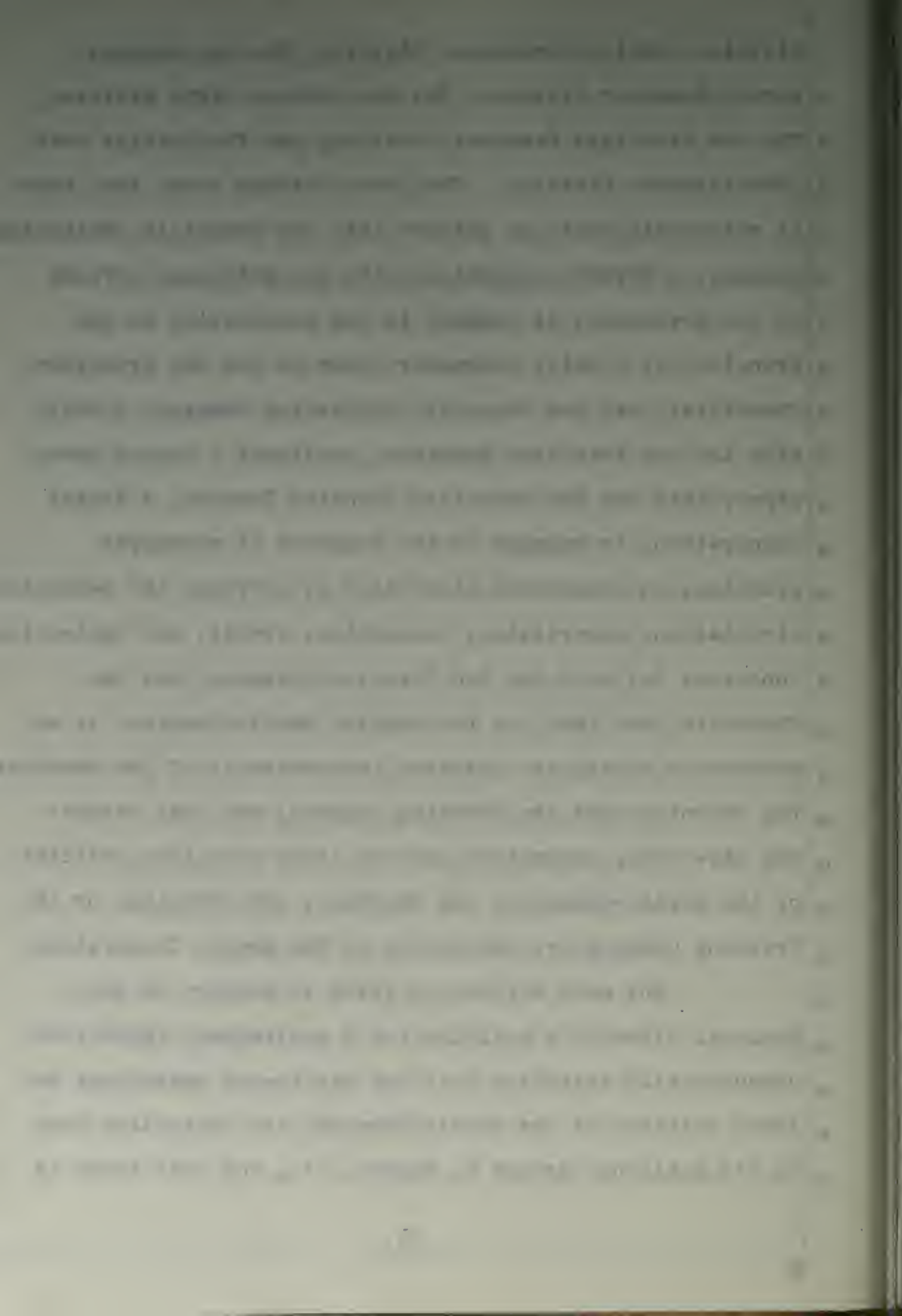
B. The District Court's Finding That There  
Is Reasonable Cause To Believe That The  
Los Angeles Herald-Examiner Is Operated  
Autonomously And Independently Of The  
San Francisco Examiner, The San Francisco  
Chronicle And The San Francisco Printing  
Company Was Not Clearly Erroneous.

The Court below found that there is reasonable  
cause to believe that The Hearst Corporation, which has its  
principal office in New York City, maintains seven news-  
paper divisions consisting of the following: The Baltimore  
News American Division, The Boston Record American-Advertiser



1 Division, Capital Newspaper Division, The Los Angeles  
2 Herald-Examiner Division, The San Antonio Light Division,  
3 The San Francisco Examiner Division, and The Seattle Post-  
4 Intelligencer Division. The Court further found that there  
5 is reasonable cause to believe that the Chronicle Publishing  
6 Company, a Nevada corporation with its principal offices  
7 in San Francisco, is engaged in the publication in San  
8 Francisco of a daily newspaper known as the San Francisco  
9 Chronicle; that the Chronicle Publishing Company, jointly  
10 with the San Francisco Examiner, publishes a Sunday news-  
11 paper; that the San Francisco Printing Company, a Nevada  
12 corporation, is engaged in the business of newspaper  
13 printing, in connection with which it performs the mechanical,  
14 circulation, advertising, accounting, credit, and collection  
15 functions for both the San Francisco Examiner and the  
16 Chronicle; and that the Los Angeles Herald-Examiner is an  
17 autonomous enterprise operated independently of the Examiner,  
18 the Chronicle and the Printing Company; and that neither  
19 the day-to-day operations nor the labor relations policies  
20 of the Herald-Examiner, the Examiner, the Chronicle or the  
21 Printing Company are controlled by The Hearst Corporation.

22         The many affidavits filed in support of the  
23 Regional Director's petition for a preliminary injunction  
24 unequivocally establish that the day-to-day operations and  
25 labor policies of the Herald-Examiner are controlled only  
26 by its publisher George R. Hearst, Jr., and that there is



1 no "appreciable integration of operations and management  
2 policies" (Poole's Warehousing, Inc., 158 NLRB 1281, 1286  
3 (1966)) of the Herald-Examiner and the other Hearst  
4 newspaper divisions, the Chronicle and the San Francisco  
5 Printing Company. In this connection, the affidavits  
6 of Richard E. Berlin, president of The Hearst Corporation,  
7 show that for many years it has been the practice of the  
8 Hearst Board of Directors to delegate full authority to  
9 the publisher of each of the Hearst papers to manage the  
10 normal affairs, the day-to-day operations and the labor  
11 relations policies and negotiations of his respective  
12 paper. None of the Hearst newspaperers seeks approval from  
13 the corporation in order to establish operating policies,  
14 labor or otherwise, or to settle issues during any  
15 collective bargaining negotiations. As stated by Berlin,  
16 he himself has never taken an active part in the day-to-day  
17 operations or labor negotiations of any of the newspapers.  
18 Berlin's testimony that the Hearst newspapers are operated  
19 autonomously and independently of each other and are not  
20 controlled by the corporation is confirmed by the affidavits  
21 of George R. Hearst, Jr., publisher of the Los Angeles  
22 Herald-Examiner, Charles L. Gould, publisher of the San  
23 Francisco Examiner, and Dan L. Starr, publisher of the  
24 Seattle Post-Intelligencer. The affidavits of George R.  
25 Hearst, Jr., demonstrate that the Los Angeles Herald-  
26 Examiner is a completely autonomous enterprise and that





1 complete control is exercised locally over its business,  
2 the news it prints, its editorial policies, the features  
3 and columns it carries, the customers it serves, and the  
4 firms from which it purchases supplies. Hearst's affidavits  
5 show that the day-to-day operations and labor relations  
6 policies and practices of the Herald-Examiner are carried  
7 out under his supervision and control or under the super-  
8 vision and control of the Herald-Examiner's general manager  
9 or managing editor. The Herald-Examiner sets its own labor  
10 policies and negotiates with unions independently of the  
11 other Hearst newspapers and of The Hearst Corporation.  
12 Its labor contracts vary greatly from those of the other  
13 newspapers, and there is no uniform pattern in the collective  
14 bargaining contracts the various newspapers have. Many of  
15 the other Hearst newspapers negotiate as parts of multi-  
16 employer bargaining units. As stated in the affidavit of  
17 Dan L. Starr, the Seattle Post-Intelligencer is a member  
18 of the Seattle Publishers Association and negotiates its  
19 labor relations contracts as a group with the Seattle Times.  
20 Similarly, the affidavit of Charles L. Gould shows that the  
21 San Francisco Examiner is a member of the San Francisco  
22 Newspaper Publishers Association, and that the Examiner  
23 negotiates its labor relations contracts as a group with  
24 the San Francisco Chronicle and the San Jose Mercury.

25 The affidavit of Charles L. Gould demonstrates  
26 that the San Francisco Examiner is completely autonomous



1 and independent of the Herald-Examiner. And the affidavit  
2 of Dan L. Starr shows that the same is true with respect  
3 to the day-to-day operations and labor-management policies  
4 of the Seattle Post-Intelligencer. Indeed, Mr. Starr  
5 states that the Seattle Post-Intelligencer purchases its  
6 cartoon features from the Los Angeles Times, the primary  
7 competitor of the Herald-Examiner.

8           As shown in the affidavit of Mr. L. A. Denny,  
9 Secretary-Treasurer of the Chronicle, that newspaper is  
10 wholly autonomous and independent from the Hearst  
11 organization. Hearst interests do not own any stock in  
12 the Chronicle. The Chronicle has absolutely no ties or  
13 connections with the Herald-Examiner. It has formal  
14 relations with the Examiner and the Printing Company only  
15 to the extent that its paper is printed by the Printing  
16 Company, 50 percent of whose stock is owned by Hearst  
17 and 50 percent by the Chronicle. Notwithstanding this fact,  
18 and the fact that the Chronicle publishes a Sunday newspaper  
19 jointly with the Examiner, the day-to-day operations of  
20 the Chronicle and its labor management policies are not  
21 even remotely connected with the operation or management of  
22 the Herald-Examiner.

23           The affidavit of Wells Smith, president of the  
24 Printing Company, shows that that corporation's day-to-day  
25 operations are wholly divorced from the management of the  
26 Herald-Examiner. Nor are the operations of the Printing



1 Company controlled in any respect by the Chronicle or  
2 the Examiner. The Printing Company is a member of the San  
3 Francisco-Oakland Newspaper Publishers Association, which  
4 acts as the collective bargaining representative of the  
5 Printing Company, the San Francisco Examiner, the Chronicle,  
6 the Tribune Publishing Company of Oakland, and Northwest  
7 Publications, Inc. (San Jose Mercury, San Jose News, and  
8 San Jose Mercury News).

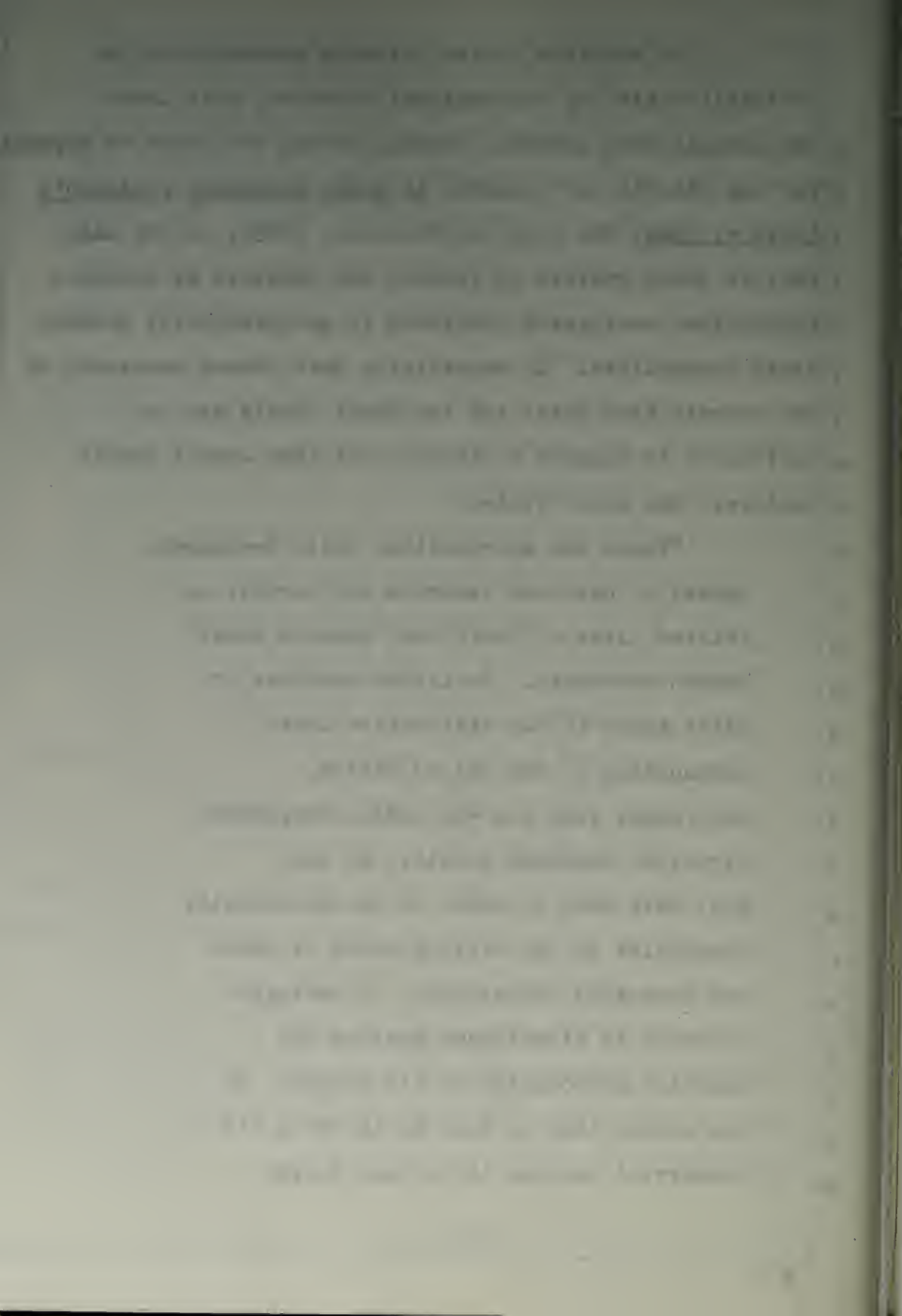
9 Appellants' brief relies heavily on the decision  
10 of the Board more than thirty years ago in William Randolph  
11 Hearst, et al., 2 NLRB 530 (1937). But that decision  
12 reflected a state of facts which has long since changed.  
13 More importantly, it was decided more than a decade before  
14 passage of the Taft-Hartley amendments which made secondary  
15 boycotting illegal. It involved the entirely different issue  
16 of whether, in assessing liability for an unfair labor  
17 practice, allegedly separate employers could be considered  
18 one person, and hence jointly liable. The Board's  
19 determination of whether two or more enterprises would be  
20 jointly liable for an unfair labor practice, rendered in a  
21 factual setting which has been history for over three decades,  
22 is obviously irrelevant to a determination, under new  
23 statutory provisions involving far different considerations,  
24 of whether different enterprises as they are operated today  
25 should be considered "one employer" for purposes of Section  
26 8(b)(4)(B).





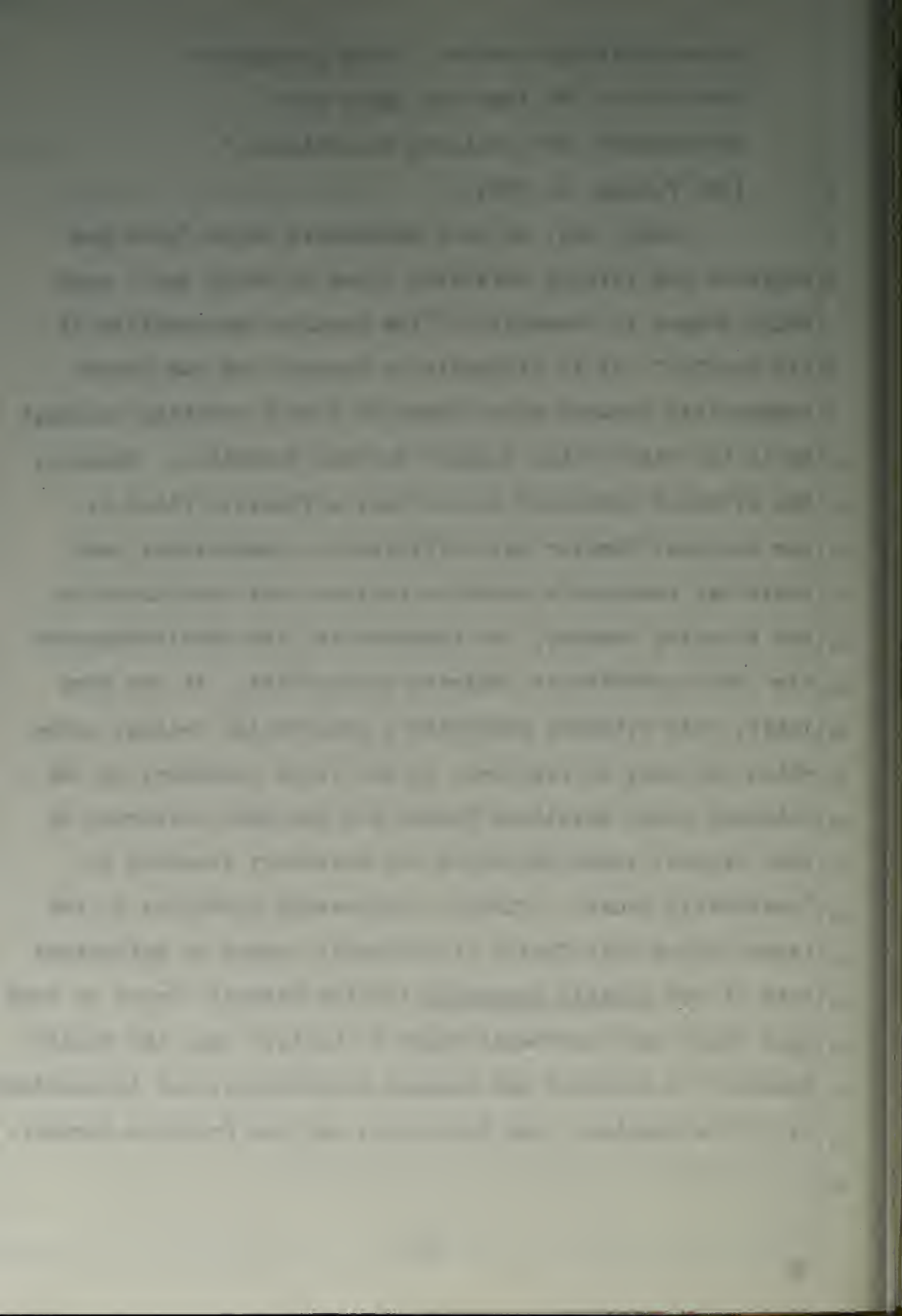
1 In addition to the evidence presented by the  
2 affidavits filed by the Regional Director, this Court  
3 can clearly take judicial notice, as did the Court of Appeals  
4 for the District of Columbia in Miami Newspaper Pressmen's  
5 Local v. NLRB, 322 F.2d 405 (D.C.Cir. 1963), of the many  
6 factors which operate to isolate and separate as distinct  
7 enterprises newspapers published in geographically distant  
8 urban communities. In emphasizing that common ownership of  
9 the Detroit Free Press and the Miami Herald was not  
10 sufficient to support a finding that they were a single  
11 employer, the court stated:

12 "These two metropolitan daily newspapers  
13 appear to have had separate and largely un-  
14 related lives of their own, despite their  
15 common ownership. Published hundreds of  
16 miles apart in two distinctive urban  
17 communities of the United States,  
18 each paper went its way under independent  
19 direction supplied locally, as they  
20 must have done in order to be successfully  
21 responsive to the varying needs of their  
22 two unrelated readerships. A newspaper  
23 reflects in significant measure the  
24 peculiar personality of its locale. To  
25 the extent that it does so in fact, its  
26 commercial success is to that degree



1 correspondingly assured. Wise publishers  
2 know this to be true and shape their  
3 arrangements and policies accordingly."  
4 (322 F.Supp. at 409).

5 Here, too, we have newspapers which "have had  
6 separate and largely unrelated lives of their own", each  
7 being shaped in response to "the peculiar personality of  
8 its locale." It is difficult to conceive of two urban  
9 communities between which there is such a striking contrast  
10 as in the case of Los Angeles and San Francisco. Clearly,  
11 the evidence presented in the many affidavits filed by  
12 the Regional Director was sufficient to demonstrate that  
13 there was reasonable cause to believe that the Chronicle,  
14 the Printing Company, the Examiner and the Herald-Examiner  
15 are each operated as separate enterprises. At the very  
16 least, this evidence presented a substantial factual issue  
17 which can only be resolved, in the first instance, by the  
18 National Labor Relations Board; and the mere existence of  
19 that factual issue satisfies the statutory standard of  
20 "reasonable cause". Finally, addressing ourselves to the  
21 issue before this Court, it obviously cannot be maintained  
22 that it was clearly erroneous for the District Court to find  
23 that there was reasonable cause to believe that the Herald-  
24 Examiner is operated and managed autonomously and independent-  
25 ly of the Examiner, the Chronicle, and the Printing Company.



1     III. THE DISTRICT COURT'S ORDER DENYING  
2         APPELLANTS' REQUEST FOR AN ORDER  
3         PERMITTING DEPOSITIONS AND/OR INTERROGATORIES  
4         AND/OR COMPELLING THE ATTENDANCE OF WITNESSES  
5         WAS NOT CLEARLY ERRONEOUS.

6         On January 23, 1968 Appellants filed with the  
7 Court below a request for an order permitting depositions  
8 and/or interrogatories and/or compelling attendance at  
9 the show cause hearing of eight named persons: William  
10 Randolph Hearst, Jr.; Richard E. Berlin; John B. Siefken;  
11 Frank Massi; George Hearst, Jr.; Dan L. Starr; Charles L.  
12 Gould; and Harold E. Kelsey. On January 30, 1968 the  
13 Charging Parties filed with the Court a memorandum objecting  
14 to Appellants' request for discovery, pointing out that  
15 the Regional Director had already filed twenty affidavits  
16 in support of his position and that since the evidence  
17 contained in these affidavits was demonstrably sufficient  
18 to support a finding of reasonable cause, even if contra-  
19 dicted, the discovery requested by Appellants would serve  
20 no useful purpose and would be an exercise in futility. On  
21 January 31, 1968, the District Court, after hearing arguments  
22 on the matter, denied Appellants' request, holding and  
23 concluding that in view of the Court's limited function  
24 in a Section 10(1) proceeding, discovery merely for the  
25 purpose of eliciting facts which would give rise to a  
26 conflict in the evidence or issues of credibility was

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1 wholly unwarranted. The Court observed that since discovery  
2 would at best only create a conflict in the evidence or  
3 raise credibility issues, all of which would have to  
4 be resolved not by the Court but by the Board, to permit  
5 discovery to the extent sought by Appellants would be  
6 tantamount to converting the ancillary proceeding before  
7 the Court into a full inquiry into the merits of the  
8 controversy.

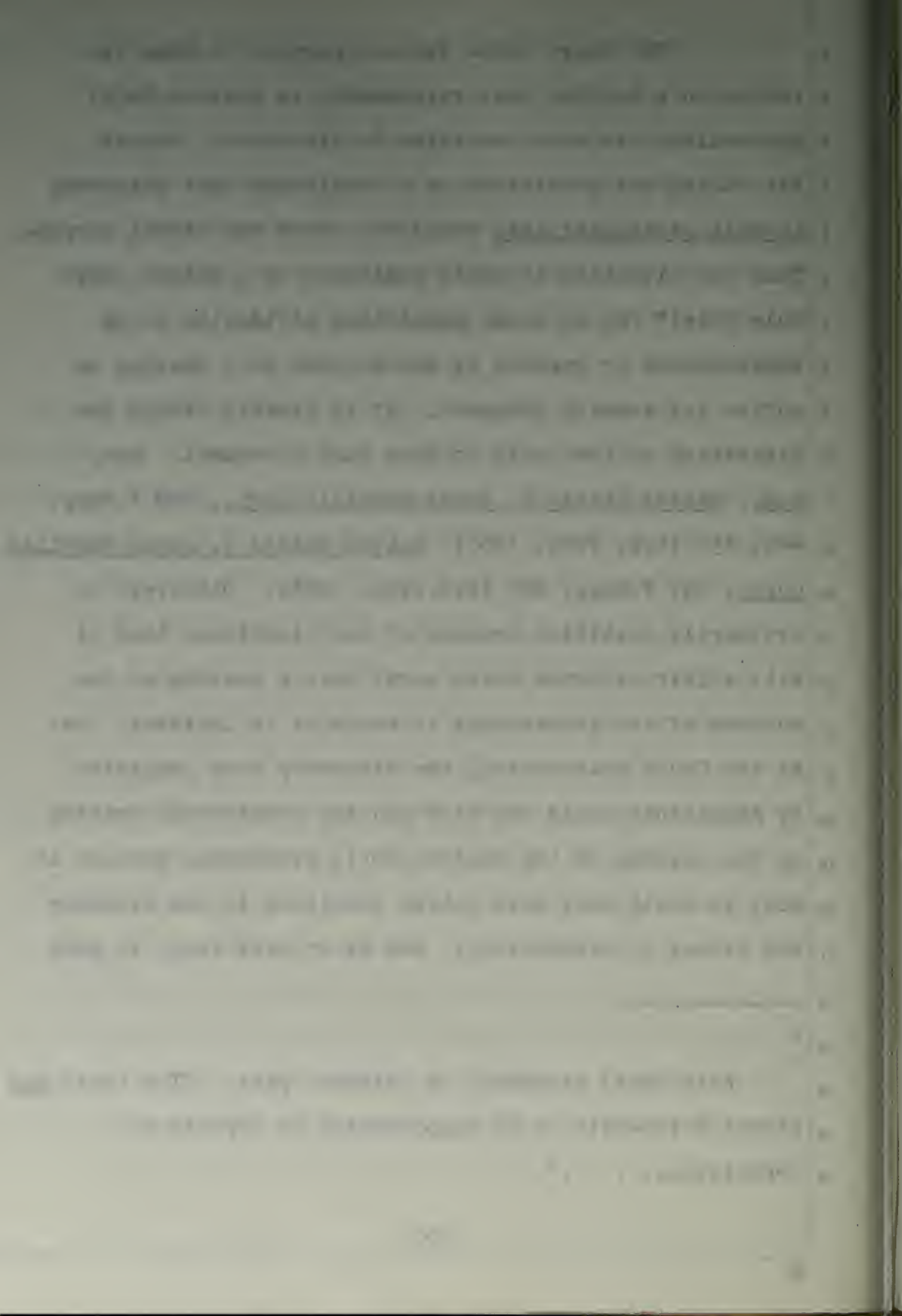
9           At the outset, it should be noted that Appellees  
10 do not contend that respondents in Section 10(1) proceedings  
11 generally are not entitled to the right of discovery accorded  
12 by the Federal Rules of Civil Procedure. That right of  
13 discovery, however, is clearly subject to being limited  
14 at the discretion of the trial court. Thus Rule 30(b)  
15 of the Federal Rules of Civil Procedure provides that  
16 the court may make an order that a deposition shall not  
17 be taken. In the proceeding below, the very fact that  
18 Appellants filed a request for an order permitting discovery  
19 was a recognition that discovery incident to such  
20 proceedings is a matter within the discretion of the court.  
21 In these circumstances, the memorandum filed by the  
22 Charging Parties in opposition to Appellants' request was  
23 tantamount to a motion for a protective order under Rule 30  
24 (b). Moreover, the Charging Parties' memorandum clearly  
25 demonstrated that good cause existed for denying Appellants'  
26 request.



1           The Court below did not purport to base its  
2 ruling on a holding that respondents in Section 10(1)  
3 proceedings are never entitled to discovery. Rather,  
4 its ruling was predicated on a conclusion that discovery  
5 in this particular case would not serve any useful purpose.  
6 Thus the situation is quite analogous to a motion under  
7 Rule 56(e)\* for an order permitting affidavits to be  
8 supplemented or opposed by depositions at a hearing on  
9 motion for summary judgment. It is clearly within the  
10 discretion of the court to deny such a request. See,  
11 e.g., United States v. Johns-Manville Corp., 259 F.Supp.  
12 440, 455 (E.D. Penn. 1966); United States v. Johns-Manville  
13 Corp., 237 F.Supp. 893 (E.D. Penn. 1965). Discovery is  
14 ordinarily justified because of the likelihood that it  
15 will elicit evidence which might have a bearing on the  
16 outcome of the proceedings to which it is incident. But  
17 as the Court below noted, the discovery here requested  
18 by Appellants could not have had any conceivable bearing  
19 on the outcome of the Section 10(1) proceeding because at  
20 most it could only have raised conflicts in the evidence  
21 and issues of credibility. And as we have seen, in Rule

22 \_\_\_\_\_  
23 \*

24           Rule 56(e) provides, in relevant part: "The court may  
25 permit affidavits to be supplemented or opposed by  
26 depositions. . . ."



1 10(1) proceedings the very existence of substantial  
2 questions of fact or issues of credibility ipso facto es-  
3 tablishes reasonable cause. It is not uncommon for a court  
4 to limit discovery when it is convinced that it will serve  
5 no reasonable purpose, as when it appears that a plaintiff's  
6 case against a defendant whom he seeks to depose is wholly  
7 unfounded. See, e.g., Waldron v. British Petroleum Co.,  
8 Ltd., 4 F.R.Serv.2d 30b.23, Case 1 (S.D.N.Y. 1961).

9 As we have seen in Part I of this brief, the  
10 district court has but a limited role in a Section 10(1)  
11 proceeding. As this Court has stated:

12 "ordinarily a dispute as to a material  
13 question of fact precludes a judgment on the  
14 pleadings, but the dispute as to the question  
15 raised by the pleadings in the instant case  
16 was not within the province of the district  
17 court to resolve; it was one for the Board  
18 to decide. It seems apparent, and the district  
19 court so found, that the Board could find  
20 either that the certification covered by  
21 the three Goodrich employees at the Union  
22 Rock Plant or that it did not. That being  
23 the case, there existed reasonable cause  
24 raised by the pleadings that appellant  
25 was engaging in an unfair labor practice,  
26 thus justifying the issuance of the injunction."

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1       (Local No. 83, Construction Drivers Union v.  
2       Jenkins, 308 F.2d 516, 517 (9th Cir. 1962).

3       All that the statutory yardstick of "reasonable  
4 cause" requires "is the prima facie establishment of facts  
5 from which an inference might be drawn that the charge is  
6 true. If this be so, injunction issues, whether the  
7 charges are ultimately proved true in the proceedings  
8 before the director or not." Kennedy v. Los Angeles Joint  
9 Executive Board of Hotel and Restaurant Employees, 192 F.  
10 Supp. 339, 341 (S.D.C 1. 1961). "The court may not resolve  
11 conflicting factual evidence in questions of credibility  
12 if the Board might reasonably resolve those issues in  
13 favor of the plaintiff." Fusco v. Richard W. Kasse Baking  
14 Co., 205 F.Supp. 459, 463 (N.D.Ohio 1962). See also McLeod  
15 v. Local 478, Int'l. Union of Operating Engineers, 278 F.  
16 Supp. 22, 30 (D.Conn. 1967). In sum, all that is required  
17 is "credible evidence, establishing a prima facie case."  
18 Greene v. Bangor Bldg. Trades Council, 165 F.Supp. 902,  
19 (N.D.Me. 1958).

20       ". . . The evidence need not establish  
21 a violation. It is sufficient to sustain  
22 the District Court's finding and conclusion  
23 if there be any evidence which might together  
24 with all the reasonable inferences that might  
25 be drawn therefrom supports a conclusion that  
26 there is reasonable cause to believe that a

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violation had occurred." (Madden v.  
International Hod Carriers, 277 F.2d 688,  
692 (7th Cir. 1960).

That the discovery requested by Appellants  
would have been an exercise in futility is amply demonstrated  
by the court's decision in Jaffe v. Henry Heide, Inc.,  
115 F.Supp. 52 (S.D.N.Y. 1953). This was a Section 10(j)  
proceeding in which there were substantial conflicts in  
the evidence developed at the hearing. Nonetheless,  
the court held that the resolution of such conflicts  
was for the National Labor Relations Board, and not the  
court:

"In this proceeding the court has  
power only to grant or deny intermediate  
relief pending the Board's final disposition  
of the complaints filed by the petitioner.  
Accordingly, the issue here is only whether  
on the evidence presented the Board could  
reasonably find that Heide committed unfair  
labor practices. There is the sharpest  
conflict in the testimony of Goddard and  
Heide as to the alleged agreement between  
the latter and the president of Local 452.  
There is also conflicting testimony as to  
whether Heide assigned organizers of Local  
452 to supervisory positions for which they

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THE DIVISION OF THE PHYSICAL SCIENCES  
DEPARTMENT OF CHEMISTRY  
CHICAGO, ILLINOIS

RECEIVED BY THE DIVISION OF THE PHYSICAL SCIENCES

FROM THE CHEMIST, THE UNIVERSITY OF CHICAGO  
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TO: THE DIVISION OF THE PHYSICAL SCIENCES  
CHICAGO, ILLINOIS  
SUBJECT: [Illegible]

RE: [Illegible]

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1 were not qualified, in order to enable them  
2 to move freely from one department to  
3 another and thus facilitate their recruiting  
4 activities; and as to whether Heide deviated  
5 from its normal practice in requiring written  
6 confirmation of the check-off cards  
7 presented by Local 50 in July, 1952.

8 These conflicts raise questions of  
9 credibility which the Board must  
10 resolve." (115 F.Supp. at 47).

11 The foregoing principle would be applicable  
12 to any of the forms of discovery that were requested by  
13 Appellants. In their request, Appellants did not  
14 specifically contend that on the basis of the petition  
15 and the affidavits before the Court there was not  
16 reasonable cause to believe that the Act had been violated.  
17 Nor did they contend that the Regional Director had acted  
18 arbitrarily or capriciously. The issue on which respondents  
19 sought discovery was characterized by them as the "limited  
20 area of the question of centralized control of the Hearst  
21 enterprise, and the inter-relationships among the various  
22 divisions of the Hearst Corporation." With respect to  
23 that issue, Appellants stated: "Affidavits of George R.  
24 Hearst, Jr., Charles L. Gould, Richard E. Berlin, Dan L.  
25 Starr and Harold E. Kelsey have been previously filed by  
26 petitioner. These affidavits, although they tend on their

The first of these is the fact that the  
 government has been unable to secure  
 the necessary funds to carry out its  
 policy of non-interference in the  
 internal affairs of the country. This  
 has led to a situation where the  
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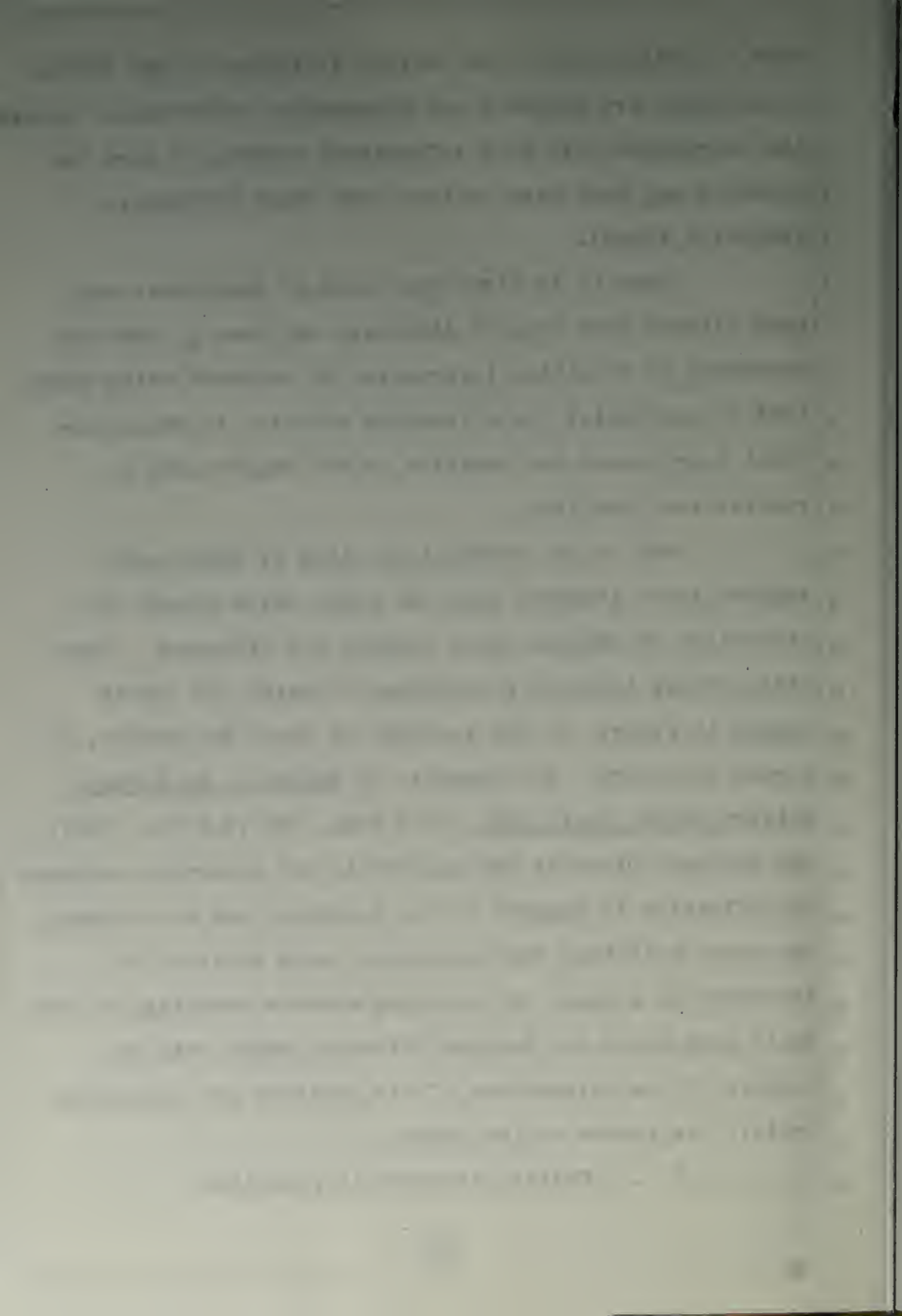


1 face to indicate that the various divisions of the Hearst  
2 Corporation are separate and autonomous, nevertheless reveal  
3 the likelihood that much information tending to give the  
4 opposite may have been omitted from these affidavits."  
5 (Emphasis added).

6 Thus it is clear that even if Appellants had  
7 been allowed some form of discovery and even if they had  
8 succeeded in eliciting information or evidence which might  
9 tend to contradict the affidavits on file, it would have  
10 still been beyond the function of the Court below to  
11 resolve such conflict.

12 Nor do the authorities cited by Appellants  
13 support their argument that the Court below abused its  
14 discretion in denying their request for discovery. Those  
15 cases merely involved proceedings in which the courts  
16 deemed it proper, in the exercise of their discretion, to  
17 permit discovery. For example, in Madden v. Milk Wagon  
18 Drivers Union, Local 753, 229 F.Supp. 490 (N.D.Ill. 1964),  
19 the Regional Director had apparently not presented evidence  
20 by affidavits in support of his position, and accordingly,  
21 the court held that the respondents were entitled to  
22 discovery as a means of obtaining advance knowledge of the  
23 facts upon which the Regional Director would rely in  
24 support of the allegations of his petition for injunctive  
25 relief. As stated by the court,

26 ". . . Unless discovery is permitted



1 In advance [of the hearing] . . . , the  
2 respondent will face the possibilities  
3 of surprise and inadequate preparation  
4 which the Federal Rules were designed  
5 to eliminate." (229 F.Supp. at 492).

The rationale underlying the court's discovery  
7 order in the foregoing case is clearly not applicable  
8 here. Here, the Regional Director had presented by way  
9 of twenty affidavits filed and served on respondents all  
10 of the evidence upon which he intended to rely at the  
11 hearing on his petition.

12 Appellants have also placed reliance upon Fusco  
13 v. Richard W. Kaase Baking Co., 205 F.Supp. 459 (N.D. Ohio  
14 1962). This was a Section 10(j) proceeding in which the  
15 Regional Director had apparently not filed with his  
16 petition affidavits setting forth the evidence upon which  
17 he intended to rely at the hearing. Notices to take  
18 depositions were served on Mattson, an attorney for the  
19 Board's Eighth Region, and Fusco, Regional Director of the  
20 Eighth Region. Subpoenas were also served on the two  
21 Board agents. The Mattson subpoena called upon him to  
22 testify only, and the Fusco subpoena called upon him to  
23 testify and produce documents. It was agreed that Mattson  
24 and Fusco would be made available for depositions, but the  
25 Regional Director objected to the production of documents  
26 described in the subpoena. The only question before the

THE OFFICE OF THE SECRETARY OF THE  
TREASURY  
WASHINGTON, D. C.  
JANUARY 1, 1900

TO THE HONORABLE THE SECRETARY OF THE  
TREASURY  
WASHINGTON, D. C.  
SIR:  
I have the honor to acknowledge the receipt of your letter of the 29th inst. in relation to the proposed amendment to the National Bank Act, and in reply to inform you that the same has been referred to the Committee on Finance, and that they are now considering the same. I am, Sir, very respectfully,  
Yours very truly,  
J. M. McKIM

1 court concerned the limits of interrogation at the  
2 depositions and document production. The subpoena which was  
3 served on Fusco directed him to produce all statements taken  
4 in his preliminary investigation. The court ordered  
5 production of statements of employees who were to be  
6 witnesses at the hearing, but refused to order production  
7 of statements taken from persons who would not be witnesses  
8 at the hearing:

9 "As to any statements of employees  
10 who are not to be witnesses, I find no  
11 good cause. Assuming that any such statements  
12 clearly showed a lack of 'reasonable cause'  
13 the net result would be a conflict in the  
14 evidence on that focal issue. As previously  
15 stated, the district court may not resolve  
16 any questions of credibility or evidentiary  
17 conflict. Hence, any such statements would  
18 not benefit respondent, even if they  
19 reflected facts squarely opposed to petitioner's  
20 theory." (205 F.Supp. at 464).

21 Thus the rationale underlying the court's  
22 discovery order in Fusco was the prevention of surprise.  
23 Here, however, Appellants had been served with affidavits  
24 containing all of the evidence upon which the Regional  
25 Director intended to rely. Thus, the precise holding  
26 in the Fusco case, if applied herein, would have left

the party, however, was not unanimous, and the result was a compromise. The compromise was that the party should support the administration in the Senate, but not in the House. This was a significant victory for the administration, as it allowed them to pass their legislation without the opposition of the House.

CHAPTER 10

The first of the great events of the year was the election of the President. The election was held on the 4th of November, and the result was a victory for the administration. The President was elected for a term of four years, and the Vice-President was elected for a term of four years. The election was a significant event, as it determined the course of the country for the next four years.

The second of the great events of the year was the signing of the Declaration of Independence. The Declaration was signed on the 4th of July, and it was a significant event, as it declared the country's independence from Great Britain. The Declaration was a bold statement, and it was a significant step towards the country's independence.



1 respondents exactly where they began: With copies of the  
2 affidavits upon which the Regional Director relied.

3 In conclusion, since it is clear that the  
4 existence of a material question of fact establishes  
5 the statutory requirement of "reasonable cause", and  
6 in view of the fact that the Regional Director had served  
7 upon Appellants copies of twenty affidavits containing all  
8 of the evidence upon which he intended to rely, the lower  
9 Court's refusal to permit discovery of the nature requested  
10 by Appellants was plainly not an abuse of discretion.

11  
12 IV. THE DISTRICT COURT'S ORDER THAT ALL  
13 EVIDENCE BE PRESENTED BY AFFIDAVITS  
14 AND THAT NO ORAL TESTIMONY BE HEARD  
15 UNLESS OTHERWISE ORDERED BY THE COURT  
16 WAS NOT AN ABUSE OF DISCRETION.

17 It well establishes in this Circuit that a  
18 preliminary injunction may be granted upon affidavits, and  
19 that the presentation of oral testimony is a matter wholly  
20 within the discretion of the district court. As this Court  
21 stated in Ross Whitney Corp. v. Smith, 207 F.2d 190 (9th  
22 Cir. 1953):

23 "In our view, a preliminary injunction  
24 may be granted upon affidavits. A requirement  
25 of oral testimony would in effect require  
26 a full hearing on the merits and would thus



1 defeat one of the purposes of a preliminary  
2 injunction which is to give speedy relief  
3 from irreparable injury . . . .

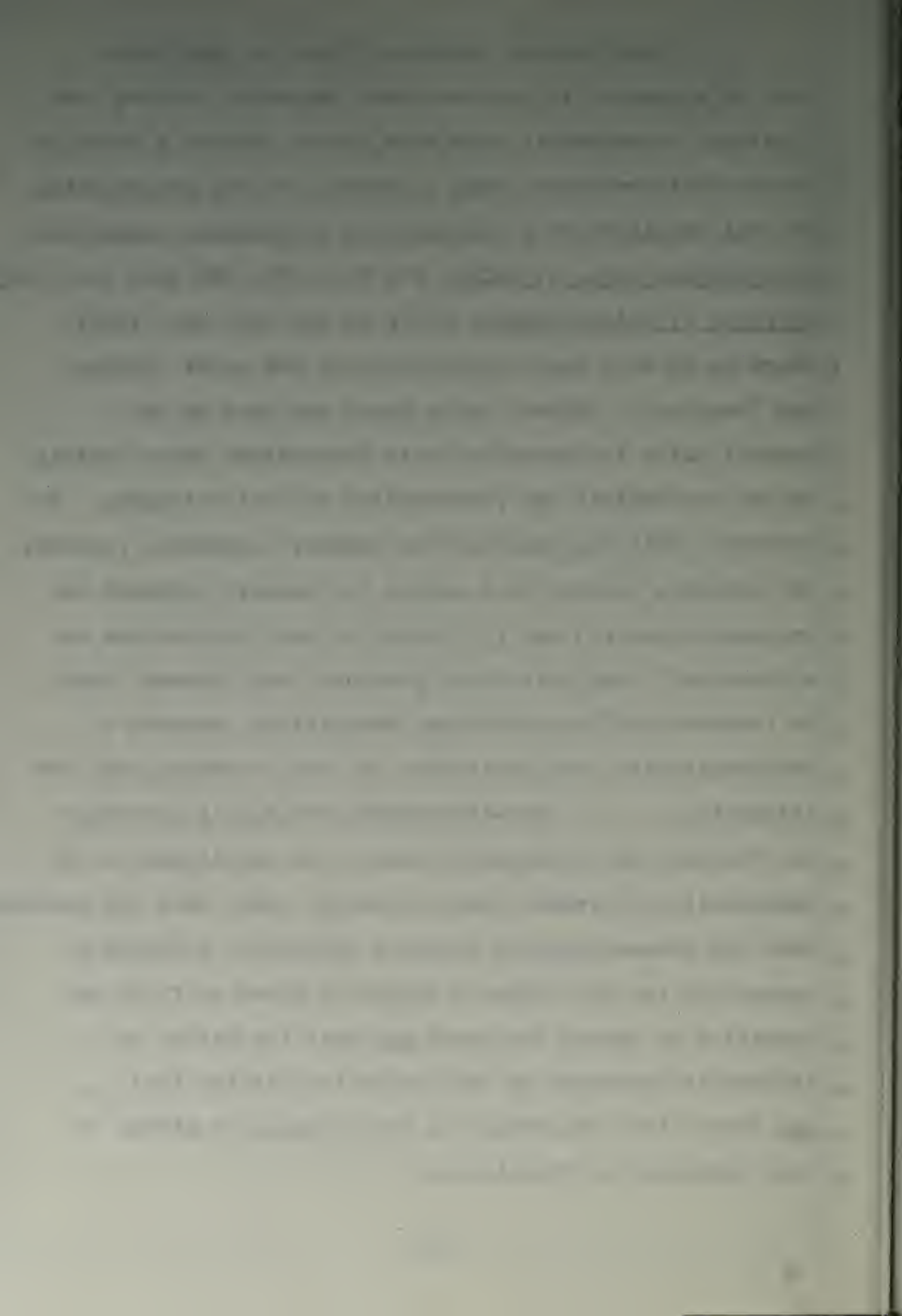
4 "As for the requirement of notice and  
5 a hearing, Affidavits meet the requirements  
6 of due process." (207 F.2d at 198).

7 The authorities to the contrary cited by  
8 Appellants, have heretofore been considered by this Court  
9 and rejected. Thus, in Hoffritz v. United States, 240 F.2d  
10 109 (9th Cir. 1956), this Court recognized that a contrary  
11 view was held by some of the other courts of appeals,  
12 citing Sims v. Greene, 161 F.2d 87 (3d Cir. 1947), but  
13 reaffirmed its previous holding that "a preliminary  
14 injunction may, in the discretion of the trial court, be  
15 granted or denied, upon affidavits." (240 F.2d at 111).

16 Appellants, in effect, urge this Court to reverse  
17 its previous holdings that Rule 65 does not require an  
18 opportunity to present oral evidence, arguing that Rule  
19 65's requirement of "notice" and a "hearing" implies a  
20 right to present oral testimony at a hearing on a motion  
21 for a preliminary injunction. In addition, Appellants  
22 argue that Section 10(1)'s provision for notice and "an  
23 opportunity to appear by counsel and present any relevant  
24 testimony" establishes a statutory right to present oral  
25 testimony at proceedings conducted pursuant to said  
26 section.



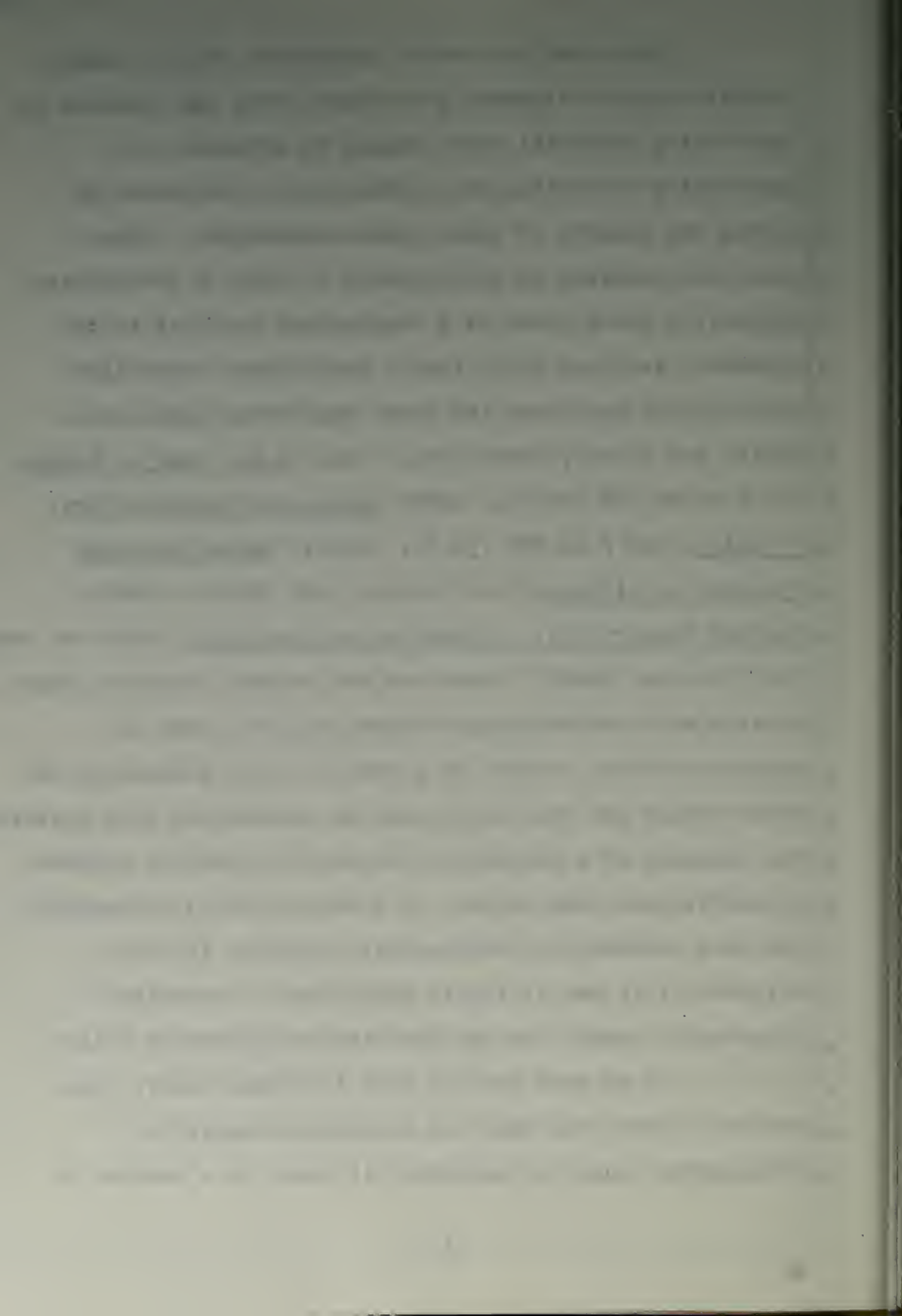
Directing our attention first to Appellants' Rule 65 argument, it is clear that the words "notice" and "hearing" contained in said Rule do not deprive a district court of discretion to deny a request for the presentation of oral testimony at a hearing on a preliminary injunction. Ross Whitney Corp. v. Smith, 207 F.2d 190, 198 (9th Cir. 1953) Hoffritz v. United States, 240 F.2d 109 (9th Cir. 1956). There is no such magic implication in the words "notice" and "hearing". Indeed, these terms are used in the Federal Rules in connection with proceedings which clearly do not contemplate the presentation of oral testimony. For instance, Rule 56, dealing with summary judgments, provides for ten days' notice on a motion for summary judgment and in subsections (c) and (d) refers to such proceedings as a "hearing". But Rule 56(c) provides that judgment shall be rendered on "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits. . . ." Notwithstanding the Rule's provision for "notice" and "hearing", there is no requirement of an opportunity to present oral testimony. And, Rule 43, dealing with the presentation of evidence generally, provides in subsection (e) that "When a motion is based on facts not appearing of record the court may hear the matter on affidavits presented by the respective parties [or] . . . may direct that the matter be heard wholly or partly on oral testimony or depositions."





1           The cases upon which Appellants rely in support  
2 of their Rule 65 argument state that where the evidence is  
3 conflicting the trial court should be afforded the  
4 opportunity of testing the credibility of witnesses by  
5 having the benefit of their cross-examination. These  
6 cases are premised on a reluctance to issue a preliminary  
7 injunction where there is a substantial conflict in the  
8 evidence, and they state that a preliminary injunction  
9 should issue only when the facts supporting preliminary  
10 relief are clearly established. See, e.g., Sims v. Greene,  
11 161 F.2d 87, 88 (3d Cir. 1947); Industrial Electric Corp.  
12 v. Cline, 330 F.2d 489 (3d Cir. 1964); Warner Brothers  
13 Pictures v. Gittone, 110 F.2d 292, 293 (3d Cir. 1940);  
14 General Electric Co. v. American Wholesale Co., 235 F.2d 606,  
15 608 (7th Cir. 1956). There are two factors, however, which  
16 clearly make the holdings of these Rule 65 cases in-  
17 applicable here: first, in a Section 10(1) proceeding the  
18 court should not feel constrained by traditional bias against  
19 the issuance of a preliminary injunction when the evidence  
20 is conflicting; and second, in a Section 10(1) proceeding,  
21 the mere existence of substantial conflicts in the  
22 evidence is in and of itself sufficient to establish  
23 "reasonable cause" for the granting of injunctive relief.

24           As we have seen in Part I of this Brief, there  
25 can be no doubt but that the statutory standard of  
26 "reasonable cause" is satisfied if there is a showing of



1 a substantial factual issue which must be resolved by  
2 the Board. Accordingly, the rationale of the cases  
3 decided under Rule 65 is wholly inapplicable, in a  
4 Section 10(1) proceeding. Moreover, the policy against  
5 issuance of preliminary injunctions, which underlies the  
6 Rule 65 decisions, is not an appropriate consideration in  
7 a Section 10(1) proceeding. For Section 10(1) commands  
8 the courts to discard their traditional reluctance to  
9 issue preliminary injunctions when there is a substantial  
10 conflict in the evidence. As this Court has stated,  
11 Section 10(1) embodies a "Congressional policy favoring  
12 the granting of temporary injunctions." Local No. 83,  
13 Construction Drivers Union v. Jenkins, 308 F.2d 516, 517  
14 n.1 (9th Cir. 1962).

15 Appellants' attempt to argue that Section 10(1)  
16 sets forth more stringent procedural criteria than Rule  
17 65 wholly ignores the fact that Rule 65 was tailored to  
18 meet the requirements of private litigation, whereas Section  
19 10(1) was intended to reflect standards of public interest  
20 and a policy favoring issuance of preliminary injunctions.  
21 To read into Section 10(1)'s reference to "testimony"  
22 a statutory requirement of "oral testimony" ignores the  
23 fact that whenever Congress has intended to make provision  
24 for the oral presentation of evidence, it has referred  
25 specifically to oral testimony and has not relied upon that  
26 meaning being implied from the word "testimony". For

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1 example, Rule 43(e), relating to the presentation of  
2 evidence at hearings on motions, provides:

3 "When a motion is based on facts not  
4 appearing of record the court may hear the  
5 matter on affidavits presented by the respective  
6 parties, but the court may direct the matter  
7 be heard wholly or partly on oral testimony or  
8 depositions."

9 Had Congress intended to impose a requirement  
10 that Section 10(1) proceedings be conducted on the basis  
11 of oral testimony, it surely would have made explicit  
12 provision therefor. For example, Section 7 of the Norris-  
13 LaGuardia Act (29 U.S.C. § 107) explicitly provides:

14 "No court of the United States shall  
15 have jurisdiction to issue a temporary or  
16 permanent injunction in any case involving  
17 or growing out of a labor dispute . . . except  
18 after hearing the testimony of witnesses in  
19 open court (with opportunity for cross-  
20 examination) . . . and testimony in opposition  
21 thereto. . . ."

22 At the time Congress enacted Section 10(1),  
23 the Senate had before it a proposal by Senator Ball which  
24 would have modified Section 10(1) by making applicable  
25 the requirements of Section 7 of the Norris-LaGuardia Act.  
26 (93 Cong. Rec. 4887, 5036, 5039). Senator Ball stated





1, that under his proposal:

2 "Any union against which a charge is  
3 made, and against which relief is sought,  
4 will have greater protection, will be granted  
5 notice and full hearing in open court under  
6 our amendment, whereas under the provision  
7 now in the Committee Bill, which wipes out  
8 all of the safeguards of the Norris-LaGuardia  
9 Act and the Clayton Act, there is no such  
10 guarantee of notice and open hearing. I  
11 think we go a little further than the  
12 Committee Bill does." (93 Cong. Rec. 5037).

13 \* \* \*

14  
15 "The provision [proposed by Senator  
16 Ball] . . . is identical with the provision  
17 now in the Norris-LaGuardia Act. It requires  
18 notice, public hearing, and cross-examination of  
19 witnesses in open court . . ." (93 Cong. Rec.  
20 5039).

21 The Senate rejected Senator Ball's proposed  
22 amendment (93 Cong. Rec. 5058), adopting instead, that  
23 Section of the committee bill which was ultimately enacted  
24 as Section 10(1) and which does not require as a pre-  
25 requisite to the granting of injunctive relief that the  
26 court hear "testimony of witnesses in open court".



1 Thus, Section 10(1) can in no way be considered  
2 as embodying more stringent procedural requirements than  
3 are contained in Rule 65. If anything, the very opposite  
4 is true.

5 "In a matter of this character  
6 [Section 10(1) proceeding] where the injunction  
7 is sought in aid of an administrative procedure  
8 provided by the Congress, the usual hesitance  
9 of courts to grant temporary injunctions  
10 [citation omitted] does not come into play.  
11 For here, as stated by the Supreme Court in  
12 a noted case, the

13 'standards of the public interest  
14 not the requirements of private litigation  
15 measure the propriety and need for  
16 injunctive relief in these cases.'

17 Hecht Company v. Bowles, 1944, 321 U.S. 321,  
18 313, 64 S.Ct. 587, 592, 88 L.Ed. 754."

19 (Kennedy v. Los Angeles Joint Executive Board  
20 of Hotel and Restaurant Employees, 192 F.Supp.  
21 339, 341 (S.D.Cal. 1961).

22 Ultimately, Appellants contend that discretionary  
23 denial of their request for the presentation of oral  
24 testimony was tantamount to making the Court below a mere  
25 rubber stamp for the Regional Director. But as we have  
26 seen, the Court below was required to issue the injunction



1 if the Regional Director's petition and the affidavits  
2 filed therewith demonstrated that there were substantial  
3 factual and legal issues for determination by the Board.  
4 Merely because the Court in this case could make that  
5 determination on the basis of the affidavits filed,  
6 rendering unnecessary the presentation of oral testimony,  
7 does not mean that the district court's function in a  
8 Section 10(1) proceedings is that of a rubber stamp. Its  
9 function is limited, but no more than is that of an appellate  
0 court which is bound to confine its scope of review to a  
1 determination of whether the trial court's findings were  
2 "clearly erroneous". Having a narrowly confined judicial  
3 function is not tantamount to being a rubber stamp.

4 In sum, it was not necessary for the Court  
5 below to hear oral testimony in order to determine whether  
6 reasonable cause existed for issuance of the preliminary  
7 injunction sought by the Regional Director. In these  
8 circumstances, it was clearly not an abuse of discretion  
9 for the Court to order that all evidence be presented by  
0 affidavits unless otherwise ordered by the Court\*.

1 \_\_\_\_\_  
2 \*

3 Although they did request that the Court compel the  
4 attendance of eight adverse witnesses, including five whose  
5 affidavits were filed by the District Director, Appellants  
6 did not request permission to have evidence presented orally  
by any of their witnesses.

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1 CONCLUSION

2 For the foregoing reasons, it is respectfully  
3 submitted that the order and supplemental order of the  
4 Court below should be affirmed.

5  
6 Respectfully submitted,

7 McENERNEY & JACOBS  
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CERTIFICATE

I certify that, in connection with the preparation of this Brief, I have examined Rules 18, 19, and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing Brief is in full compliance with these rules.

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AFFIDAVIT OF SERVICE

STATE OF CALIFORNIA

COUNTY OF LOS ANGELES

ss.

The undersigned, being first duly sworn, deposes and says that:

Affiant is a citizen of the United States and a resident of the county aforesaid; over the age of 18 years and not a party to the within entitled action; that Affiant's business address is 433 South Spring Street, Los Angeles, California.

On May 7, 1968, Affiant served the within BRIEF FOR CHARGING PARTIES - APPELLEES on the Appellants and all other parties in said action, by placing true copies thereof, enclosed in sealed envelopes with postage thereon fully prepaid, in the United States Mail at Los Angeles, California, addressed as follows:

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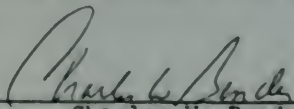
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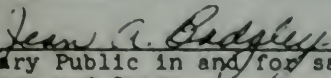
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Notary Public in and for said  
County and State

My Commission Expires November 4, 1968

